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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936 7

No. ~~552~~ 2

E. PAT KELLY, AS DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, ET AL., PETITIONERS,

vs.

STATE OF WASHINGTON ON THE RELATION OF FOSS COMPANY, INC., ALLMAN-HUBBLE TUGBOAT COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED DECEMBER 2, 1936.

CERTIORARI GRANTED JANUARY 18, 1937.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Record from Superior Court of Thurston County	1	1
Petition for writ of prohibition	1	1
Order granting temporary writ, etc.	29	23
Order granting leave to appear as amicus curiæ	32	25
Order continuing writ of prohibition, etc.	33	25
Demurrer	34	26
Answer	36	27
Memo. opinion, Wright, J.	40	30
Judgment	41	30
Notice of appeal	43	32
Bond on appeal (omitted in printing)	45	
Clerk's certificate (omitted in printing)	48	
Statement of facts	49	33
Caption	52	33
Statement for plaintiff	52	34

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—8427-C

	Original	Print
Record from Superior Court of Thurston County—Continued.		
Statement of facts—Continued.		
Testimony of Wedell Foss	62	39
H. T. Shaver	85	55
H. W. Britts	89	58
Capt. Lindley Davis	93	60
H. T. Shaver (recalled)	102	67
Oscar W. Dam	105	69
Capt. Daniel Hutchins	121	80
Wm. M. Campbell	152	100
Frank Hubble	160	106
R. J. Ultican, Jr.	168	111
Frank Gilkey	169	112
R. F. Johnson	174	115
Wedell Foss (recalled)	177	118
Capt. Lindley Davis (recalled)	180	120
Capt. Howell Parker	181	121
Colloquy	185	124
Testimony of Kenneth Durham	192	128
Colloquy	193	129
Testimony of W. H. Sutter	195	130
Wedell Foss (recalled)	201	134
Capt. Howell Parker (recalled)	202	135
Motion to dismiss	205	137
Memo. opinion, Wright, J.	206	137
Statement of Mr. Robinson re proposed order	207	138
Order settling statement of facts	209	139
Appellants' abstract of record..(omitted in printing)	210	
Proceedings in Supreme Court of Washington	237	140
Opinion, Tolman, J.	237	140
Dissenting opinion, Blake, J.	244	146
Petitions for rehearing .....(omitted in printing)	250	
Order denying petitions for rehearing	294	151
Judgment	295	151
Appellants' reply brief	298	152
Notice of motion to recall remittitur	311	157
Motion for order recalling remittitur	312	158
Order granting motion to recall remittitur	313	159
Præcipe for transcript of record	314	159
Supplemental præcipe for record	317	161
Clerk's certificate .....(omitted in printing)	318	
Order allowing certiorari	319	162

[fol. 1] [File endorsement omitted]

IN SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 15804

STATE OF WASHINGTON on the Relation of Foss COMPANY, INC., a Corporation; Allman-Hubble Tugboat Company, Inc., a Corporation; Bellingham Tug & Barge Co., Inc., a Corporation; Capital City Tug Co., Inc., a Corporation; Cascade Tug Boat Co., Inc., a Corporation; Crosby Sand & Gravel Company, Inc., a Corporation; James Draham, Foss Launch & Tug Co., Inc., a Corporation; O. D. Houchan, Johnson Tug & Barge Company, Inc., a Corporation; John W. and Allen McEwan, Doing Business ad McEwan Brothers, Merrill & Ring Lumber Co., Inc., a Corporation; Nemah River Towboat Company, Inc., a Corporation; Northwestern Logging Company, a Corporation; John Olson and Ed. M. Olson, doing Business as Olson Tug Boat Company, Olympia Towing Company, Inc., a Corporation; Pioneer Towing Co., Inc., a Corporation; Pioneer Transport Company, a Corporation; Puget Sound Tug & Barge Co., Inc., a Corporation; Schafer Bros. Lumber & Shingle Company, a Corporation; Shively Tow Boat Company, Inc., a Corporation; Delta V. Smyth, Sunset Tug & Barge Co., a Corporation; Tacoma Tug & Barge Co., Inc., a Corporation; Fred W. Thurber, Transit Towboat Company, Inc., a Corporation; R. J. Ultican Tugboat Co., Inc., a Corporation; Wagner Tug Boat Company, a Corporation; Clifford W. Waterman, doing business as Waterman Towing Co., Knappton Towboat Co., a Corporation; Shaver Transport Co., a Corporation, Plaintiffs,

vs.

E. PAT KELLY, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of the Safety Division of said Department, and Howell Parker, as Deputy of Said Director under the title Marine Inspector, Defendants

PETITION FOR WRIT OF PROHIBITION—Filed December 3, 1934

[fol. 2] Come now the plaintiffs and petition for a writ of prohibition against the defendants above named upon the

general ground that they are, in excess of all jurisdiction vested in them by law and without any authority of law, enforcing against these plaintiffs and their vessels certain provisions of Chapter 200 of the Washington Session Laws of 1907, all as more definitely shown in the following allegations::

I

Plaintiff Foss Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington and has paid its license fees last due. It owns and operates one steam and nine Diesel tugs. Said steam tug is more than forty feet in length. Of the Diesel tugs five exceed sixty-five feet in length when measured over the deck from end to end excluding sheer and four are of lesser length when so measured. Said Steam tug holds a certificate of enrollment issued by the Federal Government granting it the right and privilege to engage in the coasting trade of the United States and eight of said Diesel tugs hold certificates of registration issued by the Federal Government entitling them to the said right and privilege and to the additional right and privilege of engaging in the foreign trade. The remaining Diesel tug is licensed to engage in the coasting trade. The principal place of business of said corporation is in Seattle, Washington, and said vessels are, have been, and will be engaged in towing for hire in and upon the waters of Puget Sound and in and upon other adjacent and connecting navigable waters of the United States and in and upon ocean and foreign waters accessible therefrom, in foreign, interstate and intrastate commerce.

[fol. 3]

II

Plaintiff, Allman-Hubble Tugboat Company, Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its annual license fee last due. It owns and operates one steam tug more than forty feet in length and five Diesel tugs, one of which is more than and four less than sixty-five feet in length measured from end to end over the deck excluding sheer. All of said vessels hold registration certificates issued by the Federal government granting them the right and privilege of engaging in both the coasting and foreign

trade of the United States. The principal place of business of said corporation is at Hoquiam, Washington, and said vessels have been, are, and will be used in towing for hire in and upon the waters of Grays Harbor and in and upon other navigable waters of the United States adjacent thereto or connecting therewith and in and upon ocean and foreign waters accessible therefrom in foreign, interstate and intrastate commerce.

III

Plaintiff Bellingham Tug & Barge Co., Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license fee last due. It owns and operates four steam tugs, each more than forty feet in length, and nine Diesel tugs, all but two of which are under sixty-five feet in length measured from end to end on the deck excluding sheer. Two of said Diesel tugs hold certificates of enrollment issued by the Federal government granting them the privilege of engaging in the coasting trade, and all other of said vessels, both steam and Diesel, hold certificates of registration issued by the Fed- [fol. 4] eral government entitling them to the same privilege and to the additional privilege of engaging in the foreign trade. The principal place of business of said corporation is in Bellingham, Washington, and said vessels have been, are, and will be used in towing for hire in and upon the waters of Puget Sound and in and upon other navigable waters of the United States adjacent thereto and connecting therewith and in and upon ocean and foreign waters accessible therefrom or foreign, interstate and intrastate commerce.

IV

Plaintiff Capital City Tug Co., Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its annual license fee last due. It owns three Diesel tugs, all under sixty-five feet in length measured along the deck from end to end excluding sheer. Two of said tugs hold certificates of enrollment issued by the Federal government granting them the privilege of engaging in the coasting trade of the United States and the other holds a certificate of registration issued by the Federal government entitling it by law

to the same right and privilege and to the additional right and privilege of engaging in the foreign trade. The principal place of business of said corporation is at Olympia, Washington, and said vessels have been, are, and will be engaged in towing for hire in and upon the waters of Puget Sound and in and upon other adjacent and connecting navigable waters of the United States and in and upon ocean and foreign waters accessible therefrom in foreign, interstate and intrastate commerce.

V

Plaintiff Cascade Tug Boat Co., Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license fee last [fol. 5] due. It owns and operates two Diesel tugs, one less and one more than sixty-five feet in length measured from end to end over the deck excluding sheer. Both of said tugs hold certificates of registration issued by the Federal government entitling them to engage in the foreign as well as the coasting trade of the United States. The principal place of business of said corporation is at Seattle, Washington, and said vessels are used in towing for hire in and upon Puget Sound and in and upon other navigable waters of the United States connecting therewith. Both of said vessels have towed car barges of the "Milwaukee" Railroad and have made, and are qualified to, and are capable of, making towing voyages extending beyond the territorial boundaries of the State of Washington.

VI

Plaintiff Crosby Sand & Gravel Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington and has paid its license tax last due. Said corporation owns and operates a Diesel tug exceeding sixty-five feet in length. Said tug is a registered vessel of the United States and is used in towing upon the waters of Puget Sound and other navigable waters of the United States connecting therewith and is qualified to tow and capable of towing in foreign and/or interstate.

VII

Plaintiff James Draham is a citizen and resident of the State of Washington residing at Olympia in said state. He

owns and operates two Diesel tugs, each of which is under sixty-five feet in length measured from end to end along the deck excluding sheer. One of said vessels holds a certificate of enrollment from the Federal government granting it [fol. 6] the privilege of engaging in the coasting trade of the United States. The other holds a certificate of registration from the Federal government entitling it to the like privilege and to the additional privilege of engaging in the foreign trade. Both of said vessels have been, are and will be used in towing for hire in and upon the waters of Puget Sound and in and upon other navigable waters of the United States adjacent to and connecting therewith and may be used in and upon foreign waters accessible therefrom in the carrying in of foreign, interstate and intrastate commerce.

VIII

Plaintiff Foss Launch & Tug Co., Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its annual license fee last due. It owns and operates fifteen Diesel tugs, seven of which are more, and eight less, than sixty-five feet in length when measured from end to end over the deck excluding sheer. All of said vessels hold certificates of registration issued by the Federal government granting them the right and privilege of engaging in both the foreign and coasting trade of the United States. The principal place of business of said corporation is at Tacoma, Washington, and its said vessels have been, are and will be used in towing for hire in and upon the waters of Puget Sound and in and upon other navigable waters of the United States adjacent thereto and connecting therewith and in and upon ocean and foreign waters accessible therefrom in foreign, interstate and intrastate commerce.

IX

Plaintiff, O. D. Houchan is a citizen and resident of the State of Washington residing in Seattle in said state and [fol. 7] owns and operates a Diesel tug less than sixty-five feet in length measured from end to end over the deck excluding sheer. Said tug holds a certificate of enrollment from the Federal government granting it the right and privilege of engaging in the coasting trade of the United

States and has been and is being used by said plaintiff in towing for hire in and upon the waters of Puget Sound and in and upon other navigable waters of the United States adjacent and connecting therewith in both interstate and intrastate commerce and is eligible for registration and capable of towing between ports in the state of Washington and ports in British Columbia.

X

Plaintiff Johnson Tug & Barge Company, Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its annual license fee last due. It owns and operates four Diesel tugs, all under sixty-five feet in length when measured from end to end over the deck exclusive of sheer. All of said tugs hold certificates of registration issued by the Federal government granting them the right and privilege of engaging in the coasting trade of the United States and also in foreign trade. The principal place of business of said corporation is at Port Angeles, Washington, and its said vessels have been and will be used in towing for hire in and upon the waters of the Straits of San Juan De Fuca and in and upon other adjacent and connecting navigable waters of the United States and in and upon ocean and foreign waters accessible therefrom, in foreign, interstate and intrastate commerce.

XI

Plaintiffs John W. McEwan and Allen McEwan constitute a partnership engaged in the towing business under [fol. 8] the name of McEwan Brothers. Said partnership owns and operates a Diesel tug less than sixty-five feet in length measured from end to end over the deck excluding sheer. Said vessels holds a certificate of registration issued by the Federal government entitling her to engage in the foreign as well as the coasting trade of the United States. The office of said partnership is at Seattle, Washington, and said vessel is employed in towing for hire in and upon the waters of Puget Sound and in and upon navigable waters of the United States connecting therewith. Said vessel has made towing voyages extending beyond the boundaries of the State of Washington and holds herself in readiness to again do so when and if opportunity offers.

XII

Plaintiff Merrill & Ring Lumber Co., Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license fee last due. It owns and operates two steam tugs more than forty feet in length and two Diesel tugs less than sixty-five feet in length measured over the deck from end to end excluding sheer. All of said vessels hold certificates of registration issued by the Federal government entitling them to engage in both the foreign and coasting trade of the United States. The principal place of business of said corporation is in Seattle, Washington; and said tugs have from time to time been used, and are being used, and will be used, to tow in and upon the waters of Puget Sound and in and upon other navigable waters of the United States connecting therewith and in and upon ocean and foreign waters accessible therefrom in foreign, interstate and intrastate trade.

XIII

Plaintiff Nemah River Towboat Company, Inc., is a cor-
[fol. 9] poration organized and existing under and by virtue of the laws of the State of Washington and has paid its license fee last due. Said corporation owns and operates a Diesel tug less than sixty-five feet in length measured from end to end over the deck excluding sheer. Said vessel holds a certificate of enrollment issued by the Federal government granting her the privilege of engaging in the coasting trade of the United States. The principal place of business of said corporation is at Raymond, Washington, and said vessel is used in towing for hire in and upon the waters of the Nemah River, Willapa Harbor, and other navigable waters of the United States connecting therewith.

XIV

Plaintiff Northwestern Logging Company is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license tax last due. Said corporation owns and operates in and upon the waters of Grays Harbor and in and upon other navigable waters of the United States connected therewith a Diesel tug less than sixty-five feet in length measured from end to end over the deck excluding sheer. Said vessel holds

a certificate of enrollment issued by the Federal government granting it the privilege of engaging in the coasting trade of the United States and is capable of engaging in offshore work or towing between ports in the state of Washington and ports in British Columbia.

XV

Plaintiffs John Olson and Ed M. Olson are citizens and residents of the United States and of the State of Washington and are engaged in the towing business under the name of Olson Tug Boat Company, which name they have filed in the office of the clerk of Pierce County, Washington. [fol. 10] Said Olson Tug Boat Company operates a steam tug more than forty feet in length and three Diesel tugs, one of which is more and two less than sixty-five feet in length measured from end to end over the deck excluding sheer. Two of said Diesel tugs hold certificates of enrollment issued by the Federal government granting them the privilege of engaging in the coasting trade of the United States and said steam tug and one of said Diesel tugs are registered and have the additional right to engage in foreign trade. The headquarters of said company are at Tacoma, Washington, and said vessels are used in towing for hire in and upon the waters of Puget Sound and in and upon navigable waters of the United States connecting therewith. Two of said vessels are are capable of and have made towing voyages extending beyond the territorial boundaries of the state of Washington.

XVI

Plaintiff Olympia Towing Company, Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license tax last due. It owns and operates two Diesel tugs both under sixty five feet in length measured from end to end over the deck excluding sheer. One of said vessels holds a license from the Federal government to engage in the coasting trade and the other holds a certificate of registration issued by the Federal Government entitling her to engage in the foreign as well as the coasting trade of the United States. The principal place of business of said corporation is in Olympia, Washington, and said vessels are used in

towing for hire in and upon the waters of Puget Sound and in and upon other navigable waters of the United States connecting therewith.

[fol. 11]

XVII

Plaintiff, Pioneer Towing Co., Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its annual license fee last due. It owns and operates three Diesel tugs, all of which are less than sixty-five feet in length measured from end to end over the deck excluding sheer. Two of said tugs hold certificates of enrollment issued by the Federal government granting them the right and privilege to engage in the coasting trade of the United States and the third holds a certificate of registration entitling her to the same right and privilege and the additional right and privilege of engaging in foreign trade. The principal place of business of said corporation is in Seattle, Washington, and said vessels have been, are and will be used in towing for hire in and upon the waters of Puget Sound and in and upon adjacent and connecting navigable waters of the United States and in and upon ocean and foreign waters accessible therefrom in foreign interstate and intrastate commerce.

XVIII

Plaintiff Pioneer Transport Company is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license fees last due. It owns and operates three Diesel tugs, two of which are more and one less than sixty-five feet in length measured from end to end over the deck excluding sheer. All three of said vessels hold certificates of registration issued by the Federal government entitling them to engage in the foreign as well as the coasting trade of the United States. The principal place of business of said corporation is in Seattle, Washington, and said vessels have been, are, and will be engaged in towing in and upon the waters of Puget [fol. 12] Sound and in and upon other adjacent and connecting navigable waters of the United States and are qualified and capable of towing foreign and/or interstate should opportunity offer.

XIX

Plaintiff Puget Sound Tug & Barge Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington and has paid its annual license fee last due. It owns and/or operates six steam and twenty-three Diesel tugs. All of said steam tugs exceed forty feet in length. Of the Diesel tugs four exceed sixty-five feet in length when measured over the deck from end to end excluding sheer, and nineteen are less than sixty-five feet in length when so measured. Twelve of said Diesel and one of said steam tugs hold certificates of enrollment issued by the Federal government granting them the right and privilege of engaging in the coasting trade of the United States and five of said steam tugs and eleven of said Diesel tugs hold certificates of registration issued by the Federal government entitling them by law to the same right and privilege and to the additional right and privilege of engaging in the foreign trade. The principal place of business of said corporation is in Seattle, Washington, and said vessels have been, are and will be engaged in towing for hire in and upon the waters of Puget Sound and in and upon other adjacent and connecting navigable waters of the United States and in and upon ocean and foreign waters accessible therefrom in foreign, interstate and intrastate commerce.

XX

Plaintiff Schafer Bros. Lumber & Shingle Company is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its li- [fol. 13] cense tax last due. Said corporation owns and operates one steam tug more than forty feet in length and two Diesel tugs each more than sixty-five feet in length measured from end to end over the deck excluding sheer. All of said tugs hold certificates of enrollment issued by the government of the United States granting to them the privilege of engaging in the coasting trade of the United States. The principal place of business of said corporation is at Montesano, Washington, and said tugs have been, are, and will be used in towing in and upon the waters of Grays Harbor and in and upon other navigable waters of the United States connecting therewith. Some of them have towed interstate and all of them are capable of so doing.

XXI

Plaintiff Shively Tow Boat Company, Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license fees last due. Said corporation owns and operates four Diesel tugs, one more and three less than sixty-five feet in length measured from end to end over the deck excluding sheer. All of said vessels hold certificates of registration issued by the Federal government entitling them to engage in the foreign as well as the coasting trade of the United States. The principal place of business of said corporation is in Seattle, Washington, and said vessels have been, are, and will be used in towing for hire in and upon the waters of Puget Sound and in and upon the navigable waters of the United States connecting therewith. All of them have rendered towing service to vessels engaged in interstate commerce and some of them have made towing voyages beyond the territorial boundaries of the State of Washington.

[fol. 14]

Plaintiff Delta V. Smith is a citizen and resident of the United States and of the State of Washington residing at Olympia in said State. He owns and operates one steam tug over forty feet in length and six Diesel tugs, two of which are more than, and four less than sixty-five feet in length measured from end to end over the deck excluding sheer. Said steam tug and two of said Diesel tugs hold certificates of enrollment issued by the Federal government granting them the privilege of engaging in the coasting trade and four of said Diesel tugs hold certificates of registration issued by the Federal government entitling them to the same privilege and to the additional privilege of engaging in the foreign trade. Said plaintiff's headquarters are at Olympia, Washington, and his said vessels have been, are, and will be operated for hire in and upon the waters of Puget Sound and in and upon other navigable waters of the United States adjacent to and connecting therewith in both interstate and intrastate commerce and four of them have made towing voyages to ports outside the state of Washington.

XXIII

Plaintiff Sunset Tug & Barge Co. is a corporation organized and existing under and by virtue of the laws of the State of Washington and has paid its license tax last due. It owns and operates two Diesel tugs both less than sixty-five feet in length measured from end to end over the deck excluding sheer. Both of said vessels are registered and entitled to all the rights and privileges of registered vessels of the United States. They are used in towing for hire in and upon the waters of Puget Sound and other navigable waters connected therewith. Both are qualified to and capable of towing between ports in the state of Washington and ports of British Columbia.

[fol. 15]

XXIV

Plaintiff Tacoma Tug & Barge Co., Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license fee last due. It owns and operates five Diesel tugs, two of which are more and three less than sixty-five feet in length measured from end to end over the deck excluding sheer. Three of said vessels hold certificates of enrollment issued by the Federal government granting them the right to engage in the coasting trade of the United States and the other two hold certificates of registration issued by the Federal government entitling them to the same right and privilege and the additional right of engaging in the foreign trade. The principal place of business of said corporation is in Tacoma and said vessels have been, are, and will be engaged in towing for hire in and upon the waters of Puget Sound and in and upon adjacent and connecting navigable waters of the United States and are capable of towing in and upon ocean and foreign waters accessible therefrom and engaging in foreign as well as interstate and intrastate commerce.

XXV

Plaintiff Fred W. Thurber is a citizen and resident of the United States and the state of Washington residing in Hoquiam, Washington, and owns and operates a Diesel tug under sixty-five feet in length measured end to end over the deck excluding sheer. Said vessel holds a certificate of registration issued by the Federal government en-

titling her to engage in both the foreign and coasting trade of the United States and is used in towing for hire in and upon the waters of Grays Harbor and in and upon other navigable waters of the United States connecting therewith.

[fol. 16] XXVI

Plaintiff Transit Towboat Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington and has paid its license tax last due. Said corporation owns and operates a Diesel tug less than sixty-five feet in length measured from end to end over the deck excluding sheer. Said tug holds a certificate of enrollment issued by the Federal government granting it the privilege of engaging in the coasting trade of the United States. The principal place of business of said corporation is at Raymond, Washington, and said tug is used in towing for hire in and upon the waters of Willapa Harbor, and other navigable waters of the United States adjacent thereto and connecting therewith and in and upon ocean waters accessible therefrom.

XXVII

Plaintiff R. J. Ultican Tugboat Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington and has paid its license fee last due. It owns and operates three Diesel tugs all under sixty-five feet in length and all holding certificates of enrollment issued by the Federal government granting them the right to engage in the coasting trade of the United States. The principal place of business of said corporation is in Aberdeen, Washington, and said vessels have been, are, and will be used in towing for hire in and upon the waters of Grays Harbor and in and upon other navigable waters of the United States adjacent and connecting therewith and two of them have towed interstate and hold themselves in readiness to do so should opportunity offer.

[fol. 17] XXVIII

Plaintiff Wagner Tug Boat Company is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license fee last due. Said corporation owns and operates a steam tug

more than forty feet in length and four Diesel tugs, two of which are less than and two more than sixty-five feet in length measured from end to end over the deck excluding sheer. Said steam tug holds a certificate of enrollment issued by the Federal government granting her the privilege of engaging in the coasting trade, and all four of such Diesel tugs hold certificates of registration entitling them to the same privilege and to the additional privilege of engaging in foreign trade. The principal place of business of said corporation is in Seattle, Washington, and said vessels are used in towing for hire in and upon the waters of Puget Sound and in and upon other navigable waters of the United States adjacent thereto and connecting therewith. All of said vessels are capable of towing between Washington and British Columbia ports and three of them have towed on voyages extending beyond the borders of the state of Washington and all of them hold themselves ready to do so when and if opportunity offers.

XXIX

Plaintiff Clifford W. Waterman, doing business as the Waterman Towing Co., is a citizen and resident of the United States and of the State of Washington residing at Seattle, Washington. Said plaintiff owns and operates three Diesel tugs in towing for hire in and upon the waters of Puget Sound and in and upon navigable waters of the United States connecting therewith and in foreign waters accessible therefrom. Said vessels are under sixty-five feet in length measured from end to end over the deck excluding sheer and all of them hold certificates of registration issued by the Federal government entitling them to engage in both the foreign and coasting trade of the United States.

[fol. 18] XXX

Plaintiff Knappton Towboat Co. is a corporation organized and existing under and by virtue of the laws of the State of Washington and has paid its license fee last due. It operates several tow boats regularly documented as vessels of the United States upon the navigable waters of the United States particularly the Columbia River and other waters connecting therewith. Said vessels are largely used in interstate towing between ports in Washington and ports in Oregon.

XXXI

Plaintiff Shaver Transport Co. is a corporation organized and existing under and by virtue of the laws of Oregon. It owns a number of towboats holding Government documents and licenses entitling them to navigate upon the navigable waters of the United States. Its principal place of business is at Portland, Oregon, and its vessels are largely used in towing across the Columbia River between ports situated in Washington and ports situated in Oregon.

XXXII

The Defendant, E. Pat Kelly, is the duly constituted appointed and acting Director of the Department of Labor and Industries, an administrative department of the government of the state of Washington. Defendant Jay Olinger is the Supervisor of the Division of Safety of said Department and the defendant Howell Parker has been appointed as and is acting as a deputy of said Director of the Department of Labor and Industries under the designation, "Marine Inspector".

[fol. 19]

XXXIII

The Legislature of the state of Washington in its 1907 Session passed, and the then Governor of said State approved, an act which became Chapter 200 of the Laws of 1907. The title to said act is as follows:

"An Act regulating steam vessels, and vessels or boats operated by machinery, navigating the waters within the jurisdiction of this state, excepting vessels which are subject to inspection under the laws of the United States, and providing penalties for the violation thereof."

Said act confers upon the Commissioner of Labor (now the Director of the Department of Labor and Industries) broad and extensive regulatory powers over certain classes of vessels therein described navigating in and upon navigable waters within the exclusive jurisdiction of the state of Washington, that is to say, upon internal landlocked waters of the state as distinguished from other waters therein which through their connection with other waters are capable of being used as highways for interstate and

foreign commerce, being a part of the waters usually referred to as navigable waters of the United States.

XXXIV

The defendants, however, have erroneously construed the said act to give the Director of the Department of Labor and Industries the power and to make it his duty through his co-defendants and other deputies and agents to license and regulate under and by virtue of the act each and every vessel of the classes named in the act which at any time may be found navigating in and upon any waters within the territorial boundaries of the state of Washington except only those vessels which are inspected by the Steamboat Inspectors of the United States and said Director is proceeding to apply the act to the vessels of these plaintiffs generally described in paragraphs I to XXXI inclusive [fol. 20] of this complaint, all of which are vessels of the United States and navigating solely in and upon the navigable waters of the United States, and said Director of the Department of Labor and Industries has threatened to, and unless he is prohibited or restrained he will, through his co-defendants, acting unlawfully and in excess of his jurisdiction, proceed to do among other things the following:

(1) Cause the prosecution of these plaintiffs and all other owners of such vessels found navigating in and upon waters within the territorial boundaries of the state of Washington unless they observe and obey Section 9 of said Chapter 200, Laws of 1907, as is evidenced by his having caused to be prepared and circulated throughout the sea ports of the state a placard approved by the State Department of Efficiency reading as follows:

"Navigators Take Notice!

(Secs. 9 and 21, Chap. 200, Laws 1907)

It is unlawful to navigate the waters of the State of Washington between Sunset and Sunrise without proper Signal Lights.

For Every Infraction of this Law a Fine of Two Hundred and Fifty Dollars $250.00 shall be Forfeited to the State.

(Includes Private Power Boats.)

Department of Labor and Industries, Safety Division."

(2) To institute suits for penalties under the act against these plaintiffs and all other vessel owners who navigate vessels (not subject to inspection by the United States Steamboat Inspectors) in or upon any waters lying within the boundaries of the state of Washington unless they will among other things:

[fol. 21] (a) Submit said vessels to inspection, annually or oftener if he shall deem it reasonable, by the defendant Parker and/or other inspectors appointed by said Director at a cost to said owners of not less than five nor more than twenty dollars for each inspection.

(b) Make such changes, repairs and improvements as said Director may thereupon require.

(c) Carry such officers on said vessels as he shall after examination license as masters, pilots and engineers.

(d) Carry such crews as he shall deem necessary to manage each vessel with safety.

(e) Carry such life saving equipment as he shall require and approve.

(f) Carry such fire prevention apparatus as he shall require and approve.

(g) Keep on board at all times a copy of a license to be issued by him authorizing the vessel to navigate in and upon waters within the state, the same to be posted in a conspicuous place.

(h) Keep a copy of the first twenty-two sections of the act posted in a conspicuous place on said vessel.

(i) Keep two copies of the navigation rules set out in section 8 of the Act posted in the vessel, one in the pilot house, the other in a conspicuous place.

(j) Keep the vessel's name painted on her stern in the character and colors prescribed by Section 16 of the Act.

[fol. 22] (k) Comply with "all orders, regulations and requirements of the Commissioner" (Sec. 25); that is to say, of the defendant Director of the Department of Labor and Industries and his co-defendants, the Act providing in Section 28 thereof that any inspector employed by the

Commissioner (now Director of the Department of Labor and Industries) "may perform any act and exercise any authority herein prescribed for the Commissioner of Labor."

XXXV

Plaintiffs allege that the power to enact laws governing, regulating and controlling navigation in and upon the navigable waters of the United States is by the Constitution of the United States lodged exclusively in the Congress of the United States by the provisions of section 8 of Article I of said Constitution and section 2 of Article III thereof, and that said power has, since the foundation of the Federal government, been freely and widely and comprehensively exercised. That each and every one of the vessels of the plaintiffs generally described in paragraphs I to XXXI, inclusive, in this complaint, since they navigate only in and upon navigable waters of the United States are at all times subject to the paramount laws of the United States governing said navigation, and among others to laws prescribing:

(1) The character, color, sizes and arrangement of all lights which each of them shall carry and display under minutely specified circumstances,

(2) The manner and form in which sailing, steering and pilot rules prescribed by Congress and/or other duly authorized agencies of the United States shall be posted in said vessels.

[fol. 23] And to the end that navigation in and upon the navigable waters of the United States may be carried on with safety to passengers and crews, etc., Congress has enacted many laws, all of which are applicable to the vessels of the plaintiffs and providing among other things:

(a) That the master or owner of any such vessel must make a report to the Collector of Customs within five days if said vessel receives any accidental injury affecting her seaworthiness.

(b) That if any person knowingly sends a vessel to sea in the foreign or coastwise trade in such an unseaworthy state that the life of any person is likely to be endangered he shall be subject to a fine of not more than $1000.00 or to imprisonment not to exceed five years, or both.

(c) The exact number and specific kind of life preservers, ring buoys, and other like apparatus which must be carried to insure safety of her crew.

(d) The character and number of fire exteinguishers or other fire fighting and prevention apparatus that such vessels must carry when so navigating.

(e) What vessels shall carry and what vessels shall not be required to carry licensed officers.

(f) The kind and character of signaling equipment; i.e., whistles, bells, etc., that each vessel shall carry.

together with a multitude of other regulations concerning speed in fog, and in channels, special lights when towing, passing signals, etc. too numerous to mention but all readily found in federal statutes covering shipping and navigation or in the multifarious rules and regulations made pursuant thereto and having the force of law.

[fol. 24] XXXVI

That all vessels (including each and every vessel owned and/or operated by these plaintiffs) when operating upon any navigable waters within the boundaries of the United States and/or within four leagues of the coasts thereof are subject to boarding and inspection by any officer or officers of the government of the United States whom the Secretary of Commerce of the United States may designate to determine whether they are complying with the acts of Congress and the regulations made in pursuance thereof covering navigation and particularly those regulations designed to promote safety, and said vessels are particularly made subject to boarding and inspection by the officers and inspectors of the Bureau of Navigation and Steamboat Inspection Service and by all Coast Guard Officers and Coast Guard vessels and by all United States Custom officers whether within or without their respective districts. Said Bureau of Navigation and Steamboat Inspection Service maintains five patrol vessels whose chief function is to enforce the Motor Boat acts of the United States and these vessels during the fiscal year ending June 30, 1933, boarded and inspected 32,003 vessels. During the same period the Coast Guard inspected upwards of 200,000 vessels. That there are within the Seattle United States

Custom Collection District—which includes only a part of the state of Washington, a portion of the North Bank of the Columbia River being within the Oregon district—about three hundred United States Customs Inspectors and approximately twenty-five Coast Guard vessels and many officers and inspectors of the Bureau of Navigation and Steamboat Inspection, the exact number of which the plaintiffs are unable to state, all authorized under the laws of the United States to board and inspect any vessel navigating in or upon the navigable waters of the United States within the state of Washington or within four leagues of its coast. Plaintiffs are unable to state how many inspections are made but allege that said inspectors and inspection agencies are at all times assiduous and active.

[fol. 25]

XXXVII

That the defendants have for more than one year last past been attempting to and proceeding to enforce the provisions of said Chapter 200 of the Laws of 1907 against these plaintiffs, their vessels and employees, and plaintiffs have been informed and believe and therefore allege that they have been intimidating the officers of plaintiffs' vessels by threatening that if they continue to serve as masters, pilots or engineers thereon without submitting to examination by the said Director of the Department of Labor and Industries and securing a license from him that they will be fined fifty dollars for each day they so act, and plaintiffs further allege upon information and belief that defendants and each of them have actually issued over their signatures documents purporting to give certain individuals the right to act as masters, pilots and engineers on vessels navigating the waters of Puget Sound.

XXXVIII

That within a month last past the defendants have issued a circular letter which has been received by all of these plaintiffs, except those resident in Oregon, written upon the letterhead of the Department of Labor and Industries and signed by defendant E. Pat Kelly, as Director thereof, and by defendant Jay Olinger, as Supervisor of Safety, which letter reads as follows:

"Effective immediately, the State will proceed to inspect vessels in Washington waters as per the State Navigation Law R & B 9843-70.

Inspections made and fees collected prior to January 1st, 1935, will apply on the 1935 licenses."

That oral demands have since been made upon a number of plaintiffs to submit their vessels to inspection and such demands refused. That a number of plaintiffs who thus refused received on November 30, 1934, and on December 1, 1934, letters written on the letterhead of the Department of Labor and Industries and signed by the defendant Parker [fol. 26] as "Marine Inspector" reading as follows:

"As you have refused to comply with State of Washington Navigation Laws, Chapter 200 R & B 9843-70, I hereby notify you not to operate your tugboats without first having same inspected by the State Marine Inspector and receiving a certificate of inspection for your boats.

For non-compliance of this order, a quotation in part, from the state navigation laws, Sec. 9867, provides:

"* * * the owners and masters shall forfeit to the state of Washington the penalties prescribed in this act, and the vessel so navigated shall also be liable therefor, and may be attached and proceeded against in any court having jurisdiction. * * *"

XXXIX

That unless the defendants are restrained and prohibited by this court the plaintiffs will be compelled to make immediate choice between three possible courses of action, to-wit:

(1) To cease operating their vessels, or

(2) To submit to the demands of the defendants, or

(3) Suffer prosecution for the monetary penalties provided in Chapter 200 of the Washington Laws of 1907.

And in any event, and whichever choice they may make, the plaintiffs will necessarily suffer irreparable losses and damages for which they have no remedy at law.

XL

Plaintiffs allege that the defendants, in attempting to enforce said Chapter 200 of the Washington Laws of 1907, with respect to their vessels which operate only in and upon navigable waters of the United States, are acting in excess of any jurisdiction given them by law and that they are in so doing exercising and attempting to exercise powers rightfully belonging to and which are already being exercised by various officers and agencies of the Federal [fol. 27] government in whom said powers are exclusively vested by the Constitution of the United States and by the laws and treaties made in pursuance thereof, and further allege that if the defendants are permitted to continue in said course that these plaintiffs and each of them will be deprived of valuable rights guaranteed to them by the Constitution of the United States and the navigation laws made pursuant thereto, and plaintiffs further allege that unless the defendants are prohibited or in some way enjoined that they, the plaintiffs, will be at once and immediately be deprived of property without due process of law and denied the equal protection of the laws within the intent and meaning of the 14th amendment to the Constitution of the United States.

Wherefore, the plaintiffs petition and pray this Honorable Court upon the filing of this petition duly verified to issue an order commanding the defendants, and each of them, from the time of the service thereof to desist and refrain until the further order of the court from enforcing or attempting to enforce against the plaintiffs or their said vessels any of the provisions of Chapter 200 of the Washington Laws of 1907, (Rem. Comp. Stat. sections 9843-70) and that said order command said defendants to appear before the court at a time and place to be fixed in said order to show cause why they should not be required to desist and refrain from enforcing said act during the pendency of this proceeding and until the court shall have had opportunity in due course to try and investigate the matter on its merits.

Plaintiffs further pray that when a trial shall have been had on the merits that the restraint and prohibition of said order may be made permanent and that they may be awarded their costs and disbursements herein and such

other and further relief as the court may deem just and equitable.

John S. Robinson, 602 Central Building, Seattle, Washington, Attorney for Plaintiffs.

[fol. 28] *Duly sworn to by Wedell Foss. Jurat omitted in printing.*

[fol. 29] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ORDER GRANTING TEMPORARY WRIT OF PROHIBITION, ETC.—Filed December 3, 1934

The court having examined the petition of the plaintiffs duly verified upon oath and filed in the above entitled matter, and having examined Chapter 200 of the 1907 Laws of Washington, and having examined a certain placard and two certain letters exhibited by John S. Robinson, attorney for plaintiffs, and purporting to be the originals of the placard pleaded in paragraph XXXIV of said petition and of the two letters quoted in paragraph XXXVIII thereof, and having duly considered the whole matter, Now Therefore, in accordance with the prayer of said petition, it is

Ordered, Adjudged and Decreed that you, the defendant E. Pat Kelly, as Director of the Department of Labor and Industries of the state of Washington, and you, the defendant Jay Olinger, as Supervisor of the Safety Division of said Department, and you, the defendant Howell Parker, as a deputy of said Director under the title Marine Inspector, be, and you hereby are, commanded from the time of the service of this writ upon you, to desist and refrain until the further order of this court from attempting to enforce [fol. 30] the provisions of Chapter 200 of the 1907 Laws of the State of Washington against the plaintiffs herein, namely the Foss Company, Inc., a corporation, Allman-Hubble Tugboat Company, Inc., a corporation, Bellingham Tug & Barge Co., Inc. a corporation, Capital City Tug Co. Inc., a corporation, Cascade Tug Boat Co. Inc., a corporation, Crosby Sand & Gravel Company, Inc., a corporation, James Drahm, Foss Launch & Tug Co. Inc., a corporation, O. D. Houchan, Johnson Tug & Barge Company, Inc., a corporation, John W. and Allen McEwan, doing

business as McEwan Brothers, Merrill & Ring Lumber Co., Inc., a corporation, Nemah River Towboat Company, Inc., a corporation, Northwestern Logging Company, a corporation, John Olson and Ed M. Olson, doing business as Olson Tug Boat Company, Olympia Towing Company, Inc., a corporation, Pioneer Towing Co., Inc., a corporation, Pioneer Transport Company, a corporation, Puget Sound Tug & Barge Co. Inc., a corporation, Schafer Bros. Lumber & Shingle Company, a corporation, Shively Tow Boat Company, Inc., a corporation, Delta V. Smith, Sunset Tug & Barge Co., a corporation, Tacoma Tug & Barge Co., Inc., a corporation, Fred W. Thruber, Transit Towboat Company, Inc., a corporation, R. J. Ultican Tugboat Co., Inc., a corporation, Wagner Tug Boat Company a corporation, Clifford W. Waterman, doing business as Waterman Towing Co., Knappton Towboat Co., a corporation, and Shaver Transport Co., a corporation, or against any of the tug boats owned or operated by any of said plaintiffs so long as the operation of said vessels is confined to the navigable waters of the United States as distinguished from land-locked waters lying wholly within the boundaries of the state of Washington and not connected with waters capable of being used as continuous highways for the carrying on of interstate or foreign commerce by water.

It is Further Ordered, Adjudged and Decreed that you, and each of you, be and you hereby are, ordered and directed to appear before this court on the 17th day of December, 1934, at ten o'clock A. M., to show cause, if any you have, why the restraints and prohibitions of this order should not be continued in full force and effect pendente lite and until the court shall have had full opportunity to try and investigate this matter to determine whether or not you should not be absolutely and permanently restrained [fol. 31] from further proceeding to enforce the provisions of said Chapter 200 of the Washington Laws of 1907 against said plaintiffs and/or their vessels as prayed for in said petition.

Done in open court this 3d day of December, 1934.

D. F. Wright, Judge.

Presented by: John S. Robinson, 602 Central Building, Seattle, Washington.

[File endorsement omitted.]

[fol. 32] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ORDER GRANTING LEAVE TO APPEAR AS AMICUS CURIÆ—Filed December 17, 1934

The above entitled matter coming on for hearing on motion of Kenneth Durham for leave to appear herein as Amicus Curiae and present briefs and *and* arguments, and it appearing to the satisfaction of the court that the issues involved in the above action are of great public interest and that said Amicus Curiæ represents clients whose safety is affected by said litigation, and being fully advised in the premises, it is by the court,

Ordered that said motion be hereby granted and that said Kenneth Durham be, and he is hereby given leave to appear herein and present briefs and arguments.

Done in open court this 14 day of December, 1934.

D. F. Wright, Judge.

Presented by: Kenneth Durham.

[File endorsement omitted.]

[fol. 33] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ORDER CONTINUING WRIT OF PROHIBITION, ETC.—Filed December 17, 1934

This matter coming on before me on the 17th day of December, A. D. 1934, on the order to show cause made and entered in said case on the 3rd day of December, 1934, plaintiffs appearing by their attorney, John S. Robinson, and the defendants not appearing, it is hereby

Ordered that the said writ of prohibition made and entered in this cause on December 3, 1934, be in accordance with the prayer of the complaint, be continued in full force and effect during the pendency of this proceeding, and until the matter shall, in some way, have been disposed of upon the merits.

Done in open Court this 17th day of December, A. D., 1934.

D. F. Wright, Judge.

[File endorsement omitted.]

[fol. 34] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

DEMURRER—Filed December 17, 1934

Comes now the defendant above named by G. W. Hamilton, attorney general, and W. A. Toner, assistant attorney general, and demurs to the complaint of the plaintiff and for grounds and reasons for demurrer, assign the following:

I

That there is a defect of parties plaintiff.

II

That several causes of action have been improperly united.

III

That the complaint does not state facts sufficient to constitute a cause of action.

IV

That the court has no jurisdiction over the subject matter of the action.

V

That the plaintiff has no legal capacity to sue.

Respectfully submitted, G. W. Hamilton, Attorney [fol. 35] General; W. A. Toner, Assistant Attorney General, Attorneys for Defendants.

[fol. 36] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ANSWER—Filed March 27, 1935

Now come the defendants and, without waiving the demurrer heretofore interposed, make answer to the petition of plaintiffs as follows:

I

For answer to paragraphs I to XXXI of the petition, these answering defendants say that they have no knowledge or information concerning the matters therein contained sufficient to form a belief as to the truth or falsity of the said allegations, and that therefore they deny the same and each and every allegation therein contained.

II

For answer to paragraph XXXIV of the petition, the defendants deny that they have in any manner erroneously construed chapter 200 of the Session Laws of 1907 of the state of Washington, and deny that they have attempted to exercise jurisdiction over vessels generally, the inspection of which is by law delegated or assumed by the United States; admits that the director intends to apply the act to the [fol. 37] vessels of the plaintiffs generally described in the petition; and alleges that said vessels navigate largely between ports in the state of Washington and within the territorial boundaries of the state of Washington; that as to vessels operated by steam and not over a certain length and tonnage, and as to other vessels operated by machinery, these defendants proposed to apply the act of 1907 heretofore referred to and the rules and regulations of the director based thereon; admits that the defendants circulated the placard mentioned in subdivision (1) of said paragraph XXXIV, and alleges that it is the duty of each both of the class hereinafter referred to to comply with such regulations. The defendants further admit that they have promulgated certain regulations similar to those contained in subdivision (2) of paragraph XXXIV and that such regulations, in so far as they are consistent with regulations made by the United States, are reasonable

and proper and are in accordance with the act, and that, as to such of said regulations as are covered by federal statutes, they neither have in the past nor do they intend in the future to attempt to enforce any such provision or regulation which conflicts with a regulation lawfully established under and by virtue of the laws of the United States of America.

III

For answer to paragraph XXXV these defendants deny the said paragraph and each and every allegation, matter and thing therein contained, except that this defendant admits that certain regulations promulgated by the United States are controlling with reference to the navigation of boats described in the acts of the national Congress to which said rules are applicable; that certain regulations of the United States apply to all vessels with reference to life saving apparatus, fire prevention apparatus, signalling and lights.

[fol. 38] IV

For answer to paragraph XXXVI of the petition, the defendants deny each and every allegation therein contained, except that the defendants admit that certain acts of Congress and regulations made pursuant thereto authorize inspection of certain of the plaintiffs' boats by various inspectors, and allege that the inspection service conducted and proposed to be conducted by the defendants is not in conflict with any of the inspection services authorized by the United States or its Bureau of Navigation and steamboat inspection service.

V

For answer to paragraph XXXVII of the petition, the defendants admit that they have been attempting and proceeding to enforce the provisions of said chapter 200 of the Laws of 1907 against such of the plaintiffs, their boats and their employees, as are permitted to this state under the laws of the United States; and, while they deny that they have intimidated the officers of the plaintiffs' vessels, admit that they have required the masters, pilots, or engineers to be examined as to their qualifications and have

demanded that they secure licenses to act as such masters, pilots or engineers on vessels navigating the waters within the territorial limits of the State of Washington and particularly the waters of Puget Sound, so far as said waters are inland waters as defined by the Laws of the United States.

VI

For answer to paragraph XXXVIII, defendants admit that they have issued a circular letter as therein set forth and that they wrote to a number of the plaintiffs in the latter part of November, 1934, substantially as alleged in said paragraph.

VII

For answer to paragraph XXXIX, this defendant denies the same, and each and every allegation therein contained.

[fol. 39]

VIII

For answer to paragraph XL, these defendants deny the same, and each and every allegation and things therein contained.

Wherefore, having fully answered the complaint of the plaintiff, these defendants pray that they go hence with their costs and expenses herein incurred, as provided by law.

G. W. Hamilton, Attorney General; W. A. Toner, Assistant Attorney General; Daniel Baker, Attorneys for Defendants.

Duly sworn to by E. Pat Kelly. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 40] IN SUPERIOR COURT OF THURSTON COUNTY

No. 15804

THE STATE OF WASHINGTON on the Relation of Foss Company, Inc., a Corporation, et al, Plaintiffs,

vs.

E. PAT KELLY, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of the Safety Division of said Department, and Howell Parker, as a Deputy of Said Director under the title Marine Inspector, Defendants

MEMO OPINION—Filed May 17, 1935

It is impossible for this Court to reconcile many of the authorities cited by counsel. However, after a rather thorough consideration, it is the opinion of the Court that the act complained of is susceptible of a construction by the defendant that would not be overlapping the field covered by Federal law. In so ruling, the Court is expressing no view as to the specific acts on the part of the defendant.

An order may be taken in conformity herewith.

D. F. Wright, Judge.

[File endorsement omitted.]

[fol. 41] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

No. 15408

THE STATE OF WASHINGTON on the Relation of Foss Company, Inc., a Corporation; Allman-Hubble Tugboat Company, Inc., a Corporation; Bellingham Tug & Barge Co., Inc., a Corporation; Capital City Tug Co., Inc., a Corporation; Cascade Tug Boat Co., Inc., a Corporation; Crosby Sand & Gravel Company, Inc., a Corporation; James Drahm, Foss Launch & Tug Co., Inc., a Corporation; O. D. Houchan, Johnson Tug & Barge Company, Inc., a Corporation; John S. and Allen McEwan, Doing

Business as McEwan Brothers; Merrill & Ring Lumber Co., Inc., a Corporation; Nemah River Towboat Company, Inc., a Corporation; Northwestern Logging Company, a Corporation; John Olson and Ed M. Olson, Doing Business as Olson Tug Boat Company; Olympia Towing Company, Inc., a Corporation; Pioneer Towing Co., Inc., a Corporation; Pioneer Transport Company, a Corporation; Puget Sound Tug & Barge Co., Inc., a Corporation; Schafer Bros. Lumber & Shingle Company, a Corporation; Shively Two Boat Company, Inc., a Corporation; Delta V. Smyth, Sunset Tug & Barge Co., a Corporation; Tacoma Tug & Barge Co., Inc., a Corporation; Fred W. Thurber, Transit Towboat Company, Inc., a Corporation; R. J. Ultican Tugboat Co., Inc., a Corporation; Wagner Tug Boat Company, a Corporation; Clifford W. Waterman, Doing Business as Waterman Towing Co.; Knappton Towboat Co., a Corporation; Shaver Transport Co., a Corporation, Plaintiffs,

vs.

E. Pat Kelly, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of the Safety Division of Said Department, and Howell Parker, as a Deputy of Said Director under the Title Marine Inspector, Defendants

Judgment—Filed June 24, 1935

[fol. 42] This matter having come on before the court for hearing on the 27th day of March, 1935, the plaintiffs appearing by their attorney, John S. Robinson, Esq., and the defendants appearing by the attorney general, W. A. Toner, Assistant attorney general, and Daniel Baker, Esq., and the court having heard the testimony of the witnesses produced by the respective parties and having considered the exhibits introduced and having heard the argument of counsel for the respective parties, and being fully advised in the premises; and it appearing further to the court that the defendants have heretofore interposed a demurrer of the plaintiff's complaint on the ground, among others, that several causes of action have been improperly united; that the complaint does not state facts sufficient to constitute a cause of action; and that the court has no jurisdiction over

the subject matter of the action, and the court being of the opinion that chapter 200 of the 1907 session laws of the State of Washington is susceptible of such a construction by the defendants that would not be overlapping the field covered by the federal law, and until and unless the contrary appears this court should not restrain alike acts both within and without the jurisdiction of the department, reserving the right, and without prejudice to the right on the part of the plaintiffs to hereafter complain of and secure relief in case the defendants should transgress upon the field covered by the federal law; now, therefore, it is

Considered, Adjudged and Ordered by the court that the complaint of the plaintiffs be, and the same is, dismissed with costs to the defendants to be hereafter taxed, and further that the temporary restraining order herein be vacated and set aside.

D. F. Wright, Superior Judge.

Copy received this June 24th, 1935.

John S. Robinson, Atty. for Plff.

Presented by W. A. Toner, of Attys. for Defendants.

[fol. 43] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed July 3, 1935

[fol. 44] To the Above Named Defendants and to the Honorable G. W. Hamilton, W. A. Toner and Daniel Baker, their attorneys:

Please take Notice:

That the plaintiffs above named and each and all of them feeling aggrieved by that certain final order of the Court, made, entered and filed on June 24th, 1935, dismissing the above entitled proceedings, herewith appeal to the Supreme Court of the State of Washington from the said order and from each and every part thereof.

John S. Robinson, Attorneys for Plaintiff.

Received a copy of the foregoing Notice of Appeal, this 3rd day of July, 1935.

W. A. Toner, Asst. Atty. General, of Attorneys for Defendants.

[fols. 45–47] Bond on appeal for $200.00, approved and filed July 5, 1935, omitted in printing.

[fol. 48] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 49–51] [File endorsements omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

No. 15804

THE STATE OF WASHINGTON on the Relation of Foss COMPANY, INC., a Corporation, et al., Plaintiffs,

vs.

E. PAT KELLY, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of the Safety Division of said Department, and Howell Parker, as a Deputy of Said Director under the Title of Marine Inspector, Defendants

Statement of Facts—Filed July 31, 1935; Filed in Supreme Court January 8, 1936

[fol. 52] Be It Remembered, that the above entitled cause came on regularly for hearing before the Honorable D. F. Wright, one of the judges of the above entitled court, sitting in Department No. 2 thereof, at the Thurston County Court House at Olmypia, Washington, at the hour of ten o'clock a. m. on Wednesday, the 27th day of March, A. D., 1935; the parties herein appearing by their respective attorneys as follows:

The plaintiff by John S. Robinson;

The defendants by W. A. Toner, Assistant Attorney General, and Daniel O. Baker, of counsel;

Kenneth Durham, Appearing amicus curiæ.

STATEMENT OF COUNSEL

Mr. Robinson: May it please the Court, the Court is somewhat familiar with this case due to the long argument we had in December on the demurrer. Since that time there has been an Answer filed here, and I think it might be well to briefly go over the issues again before we call the testimony.

This is an action brought by thirty-one firms or individuals operating tugs at some time or another upon waters within the territorial boundaries of the State of Washington, and was brought to secure a writ of prohibition against the Director of Labor and Industries, against the head of the Department of Public Safety, and against Howell Parker, as a deputy under said director, under the title of Marine Inspector.

[fol. 53] The first thirty-one paragraphs of this Complaint describe in a general way the vessels which are owned or operated by these plaintiffs. A tabulation of those shows that there are one hundred seventy-two of them. Thirty-three of them are steam vessels about which I think, under the issues as now made up, there will be no substantial dispute; and one hundred thirty-nine are vessels operated by some form or other of internal combustion engines. In the pleadings I have referred to these as Diesel vessels, which is not accurate because some of them are gas boats. When I say Diesel vessels I mean operated by some power other than steam. Of these vessels, ninety-eight are less than sixty-five feet in length and forty-One are more than sixty-five feet in length, and five of them are of a burden in excess of a hundred gross tons.

Now, the action centers around the allegations beginning after '31. We allege that these three individuals, as officers in their official capacities, have mis-construed chapter 200 of the Laws of 1907 and are proceeding to exceed any authority which they have under any law to do certain acts. Those acts are described in paragraph thirty-four of the [fol. 54] Complaint, and I think that it might be well to review them:

We set up there that these parties, assuming to act under virtue of the law of 1907, are going to do certain things with reference to all vessels operating at any time upon any waters within the territorial boundaries of the State of

Washington, except such as are inspected by the steamboat inspectors;

And that they are, that they threaten to cause the prosecution of these plaintiffs and all other owners of such vessels found navigating on the waters of the State of Washington unless they obey the light rules set down in such laws;

And threaten to institute suits for penalties under the law against any of these vessels unless the owners submit the vessels to inspection annually, or oftener if the Director deems it necessary, by the defendant Parker or other inspectors;

That they must make such changes, repairs and improvements as the Director may require;

That they will prosecute them for penalties unless they carry such officers as the Director, after examination, shall license as masters, pilots and engineers; unless they carry such crews as he shall deem necessary to manage the vessel [fol. 55] safely; unless they carry such life-saving equipment as the Director shall require; unless they carry sufficient fire prevention apparatus as he shall require; unless they keep on board a copy of the license issued by him authorizing the vessel to navigate in and upon the waters within the State, the same to be posted in a conspicuous place; unless they keep a copy of the first twenty-two sections of the Act posted in a conspicuous place on said vessel; and keep two copies of the navigation rules set out in section 8 of the Act posted in the vessel, one in the pilot house, the other in a conspicuous place; unless they keep the vessel's name painted on her stern in the character and colors prescribed by section 16 of the Act;

And, finally and generally, unless they will comply with "all orders, regulations and requirements of the Commissioner;" that is to say, of the defendant Director of the Department of Labor and Industries and his co-defendants, because the Act provides in its last paragraph that any inspector employed by the Commissioner, now Director of the Department of Labor and Industries, "may perform any act and exercise any authority herein prescribed for the Commissioner of Labor."

Now, in the Answer which was filed recently, the defend- [fol. 56] ants say that—"deny that they have, in any manner, erroneously construed chapter 200 of the Session Laws

of 1907 of the State of Washington, and deny that they have attempted to exercise jurisdiction over vessels generally, the inspection of which is by law delegated or assumed by the United States; admits that the Director intends to apply the Act to the vessels of the plaintiffs generally described in the petition; and alleges that said vessels navigate largely between ports in the state of Washington and within the territorial boundaries of the state of Washington; that as to vessels operated by steam and not over a certain length and tonnage, and as to other vessels operated by machinery, these defendants proposed to apply the Act of 1907 as hereinbefore referred to and the rules and regulations of the Director based thereon; admits that the defendants circulated the placard mentioned in subdivision 1''—that is the one concerning lights—''and alleges that it is the duty of each boat of the class hereinafter referred to to comply with such regulations.

The defendants further admit that they have promulgated certain regulations similar to those contained in subdivision 2 of paragraph 34''—those are the things I [fol. 57] just read—''and, insofar as they are consistent with regulations made by the United States, are reasonable and proper and are in accordance with the Act, and that, as to such of said regulations as are covered by Federal statutes, they neither have in the past, nor do they intend in the future to attempt to enforce any such provision or regulation which conflicts with a regulation lawfully established under and by virtue of the laws of the United States of America.''

If I understand that pleading rightly, counsel say they will not attempt to enforce any of these things insofar as they are contrary and conflicting to Federal law, but do intend to enforce as far as they are consistent.

If the Court pleases, I don't think it is necessary to go further, except to say our position is this: that we are entitled to have the writ of prohibition now in force made permanent for a number of reasons. Not to argue the case, but to state at this time, so the Court may have in mind as we go along what our contentions are, the first reason is that we think this law should be construed to apply only to land locked lakes in the State of Washington and not at all to waters, public waters of the United States.

[fol. 58] That is a question of construction. We shall, in due time, argue to Your Honor that so many of these things obviously were beyond the power of the State to pass that it must have thought it was legislating for the land locked lakes over which it has full authority.

The second point will be that, in any event, so much of this law, practically all of it, is unconstitutional when passed, or, if not unconstitutional when passed, has been superseded by subsequent Federal legislation, that the Court will hold the entire law void, and deem, if the Legislature had not, the entire scheme was illegal and the entire law must be declared void, although occasional sentences are found which might stand.

In that connection, Your Honor will remember there is no saving clause in the law.

The third is that, in any event, none of these vessels which are involved in this suit are contemplated by the law as it now stands, because we contend that all of them are, in some way or other, subject to the inspection laws of the United States. We, of course, do not claim they are all subject to the steamboat inspectors; but the law does not say subject to the steamboat inspection laws. It says [fol. 59] except those subject to the inspection laws of the United States.

And, finally, we shall also point out to Your Honor that practically everything, and I shall contend everything, in regard to every vessel here is covered by some enactment or regulation having the force of law of the United States. And under the well known rule *that where the United* States has legislated upon a commercial matter that all state enactments must fall, if any there were. That, under that rule, this matter should be made permanent.

There are many subsidiary matters connected with this thing which will turn up as we go along, but I think that is all that is necessary as far as we are concerned, to advise the Court and counsel of the main issues of law and fact. The Answer also denies, for lack of information, the first thirty-one paragraphs of the Complaint. Of course, counsel could not do otherwise than admit something he did not know anything about, and as the pleadings stand, I shall have to go on and prove those as well as I can; and I think I have got practically everybody here, and I will begin upon that task immediately.

Mr. Toner: I think counsel rather misunderstood the matter. I told counsel that our denial was a proper formal denial; that we knew nothing about those matters and the [fol. 60] only thing we desired to question was certain inaccuracies with reference to things alleged in there with reference to the boats that would probably arise in the evidence, and we didn't intend to ask you to prove each and every one of the dimensions of these boats miscellaneously.

Mr. Robinson: Can we stipulate in some form on the matter in that case?

Mr. Toner: Before we proceed with the case, in checking over the Complaint, I read section 33 as to the conclusion of law, and I therefore did not particularly deny it, but I find that in the latter part of the paragraph there may be something that isn't a conclusion of law and, if so, I would like to have our Answer amended to specifically deny. The paragraph reads:

"Said Act confers upon the Commissioner of Labor (now the Director of the Department of Labor and Industries) broad and extensive regulatory powers over certain classes of vessels therein described navigating in and upon navigable waters within the exclusive jurisdiction of the State of Washington, that is to say, upon internal landlocked waters of the State as distinguished from other waters therein which, through their connection with other [fol. 61] waters, are capable of being used as highways for interstate and foreign commerce, being a part of the waters usually referred to as navigable waters of the United States."

We do not intend by a failure to deny that allegation, to admit it applies only as counsel suggests, to land locked waters, or lakes, as counsel expresses it. But we contend the Act applies within the territorial limits of the State of Washington and that would include practically all of Puget Sound outside of certain portions of the Straits of San Juan, practically at the place where the State boundary runs through the Straits.

Mr. Robinson: Mr. Toner, I can't very well ask you to admit everything in those first thirty-one paragraphs, but what stipulation can we make concerning those? Are you willing to stipulate the ownership of the vessels is as

stipulated in the first thirty-one paragraphs, and the enrollment and registry is as recited, and that those vessels stated to be under sixty-five feet in length in that paragraph are, in fact, under sixty-five feet?

Mr. Toner: I think that is true as to a large majority of those matters. I think it may be stipulated that, except as our testimony shows, or our witnesses, with respect to some particular boat, that it is not of that character, that [fol. 62] would be the only kind of a one we would want to raise.

Mr. Robinson: If that is the case, you should notify me now, because I don't want to keep thirty-one people here in case of that, if something comes up.

Mr. Toner: I think it is not material to the issues, and so I think it would be well to stipulate to all of them.

Mr. Baker: We would like to have you keep the owners of the Hubble Tugboat Company because we want to call them for adverse witnesses later on.

Mr. Robinson: Then it is stipulated that I will not be required to put on witnesses as to the sizes.

Mr. Wedell Foss, being a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Mr. Foss, you are an officer of the Foss Company, Incorporated, are you not?

A. Yes.

Q. What officer?

A. President.

Q. Is that the company that has its headquarters in Seattle?

A. Yes.

Q. You are also an officer of the Foss Tug and Launch Company, Incorporated?

[fol. 63] A. Yes.

Mr. Baker: I am sorry we didn't state this before. If the Court will notice, we reserved our demurrer which the Court has not ruled upon. We would like to have it noted for the record.

The Court: It may be understood.

Mr. Robinson:

Q. What officer are you of the Tacoma company?

A. Vice president.

Q. Mr. Foss, you have been in the tugboat business on Puget Sound for a long time?

A. Yes.

Q. You grew up in it, did you not?

A. Yes.

Q. Your father was operating tugboats on the Sound before you were born, or about that time, was he not?

A. Just about.

Q. Under the stipulation here, it will be unnecessary to go into the particulars of your boats, but I will ask you some matters which are not covered in the pleading along particulars. Have you any vessels of more than a hundred tons burden, I mean operated other than steam, in the Foss Company?

A. Yes.

Q. What vessels?

A. Tug Arthur Foss and tug Andrew Foss.

Q. The Arthur Foss is which company?

A. Tacoma.

Q. And the other one, is it not, Seattle?

[fol. 64] A. Seattle.

Q. Those are the only motor driven tugs you have in your two fleets that have over a hundred tons burden?

A. That is correct.

Q. Mr. Foss, do you, under ordinary conditions, ever use these tugs in foreign trade?

A. Quite often.

Q. Where to?

A. Straits of Juan de Fuca. California.

Q. Do you have to go between points in Washington and points in British Columbia with those tugs?

A. Yes.

Q. Have you ever had to take coal with motor driven tugs?

A. Yes.

Q. Any point to the Columbia River?

A. I don't think we have been down there recently.

Mr. Baker: We will stipulate they are used in commerce outside of Puget Sound. You have alleged that.

Mr. Robinson: May I go a little further, Mr. Baker, and I may ask you to extend your stipulation a little.

Mr. Baker: I can't see the materiality of it, but I have no objection.

Mr. Robinson:

Q. Mr. Foss, how large a tug is capable of towing business, for instance, with British Columbia?

A. British Columbia, geographically, is the same as the State of Washington. The same tugs except the little harbor tugs in the Sound can go to British Columbia and Vancouver Island.

[fol. 65] Q. You have been over this situation with me and you know fairly well all these tug boats on the Sound, do you not?

A. Yes.

Q. Would you say substantially all the tugs in this Complaint are capable of towing between the State of Washington and British Columbia?

A. The majority of them. Some of the Harbor tugs aren't.

Q. The vast majority are?

A. Yes, sir.

Q. Now, Mr. Foss——

Mr. Robinson: Mr. Baker, will you extend your stipulation to that extent? That the majority of motor tugs involved here are capable of going between British Columbia and Washington?

Mr. Toner: We have no objection to that.

Mr. Robinson: Very well, I will drop that permanently.

Mr. Toner: Only as to their capability of doing it.

Mr. Baker: That is, they are capable of towing between the United States and Canada, or along the Coast. You didn't mention along the Coast.

Mr. Robinson: I wasn't asking along the Coast, but you are not prepared to admit that a lot of these actually do?

Mr. Toner: We don't question they do occasionally, but as to their actual work, we want to examine into that. Our contention is a lot of their work is intrastate.

Mr. Robinson: I am willing to admit that undoubtedly, taking these vessels as a whole, the largest part of the [fol. 66] time is concerned with purely intrastate work; but

I wish to prove, unless you will admit it, that substantially all of them are capable of towing interstate or foreign, and that a great many of them do from time to time, have and will continue to do so, and are capable of doing it.

Mr. Toner: I think that is satisfactory.

Mr. Baker: Instead of saying substantially all, we will say the majority, as Mr. Foss says.

Mr. Robinson:

Q. Mr. Foss, does the Coast Guard ever have anything to do with these tugs?

A. Yes.

Q. What?

A. Well, they inspect them for——(interrupted).

Mr. Baker: I wish to rise to an objection. It occurs to me we aren't interested in what the Coast Guard does. It is what they have power to do, and it is according to statute.

The Court: He may answer.

Mr. Robinson: I can't prove everything at once. I will prove they have the power to do it and do do it. You are not going to contend that the Coast Guard is acting illegally all the time in stopping these fellows whenever they want? Are you going to raise a contention that the Coast Guard, in stopping these men when they want to, are acting illegally?

Mr. Baker: I don't think you can put those words in my [fol. 67] mouth. The only thing concerned here is whether or not, as a matter of statute, the power is in the Coast Guard to do it. That isn't a matter of testimony any more than if I were to go out and hold myself up for a practice of medicine. The question wouldn't be whether I was practicing medicine, it would be whether or not I had a right to. That is the way with everything you have alleged. This is a question of law, not a question of fact.

Mr. Robinson: The Coast Guard's activities will be determined by what the Coast Guard does.

The Court: You may put on the proof.

Mr. Baker: May we have an exception?

Mr. Robinson:

Q. Go on, Mr. Foss.

A. The Coast Guard Cutters overhaul our vessels from

time to time and the Captain in charge is duly signed on. At the Custom House they observe whether your name is painted on according to law. They look at your life-preservers and see the rules of road are posted, and exercise considerable authority in whether you blow the right kind of whistles.

If you don't signal right, and your maneuvering is improper, they levy fines for that offense.

Q. Do they go over your fire prevention equipment?

A. Yes.

Q. Do they go over your life preservers?

A. Yes.

[fol. 68] Q. Do they look into whether your official number is cut on your main beam and things of that sort?

A. Yes.

Q. Does anybody from the Custom House do anything of that sort, from the Custom service?

A. They do that when the numbers are carved in originally, and in some ports, and a while in Seattle, the Custom had their own boat supplementing the Coast Guard activity.

Q. So they took charge of the same activity of the Coast Guard?

A. Yes, they are the same, under the Treasury Department.

Q. What is a navigation inspector, do you know?

A. No, I don't. Do you mean the——

Q. You find in the Commerce Department reference to navigation inspectors. Who are those?

A. Those are the United States steamboat inspectors.

Q. There are others?

A. They don't operate in Puget Sound. They do in other parts of the country.

Q. Mr. Foss, you built some of these tugs and put them in operation during your experience in the tug boat business?

A. Yes.

Q. When you build a new tug, say a fifty-foot power driven tug, do you have to have any inspection by the Government and, if so, by whom?

A. The Custom service of the Treasury Department inspects the vessel for the size. You have to take out what they call the papers of enrollment. You have to provide

[fol. 69] a Master Carpenter's certificate describing the vessel and saying you have authority to register it. You have to file a paper you are an American citizen. They send an ad-measurer out and he surveys it carefully and reports to Washington for size and the people in Washington compute her tonnage, and they give her an official number and it is carved in the main beam of the vessel and the official tonnage is carved in; and they send an inspector out to verify it, and then they issue the registration enrollment, or license.

Q. Whichever you apply for?

A. Yes.

Q. Do they check over the lights, and so on, and the equipment at that time?

A. Not at that time. The Coast Guard checks over that after you get going.

Q. Where does the Coast Guard make these inspections, come around regularly to your dock?

A. They come around at least once a year, and oftener.

Q. You mean they come to the headquarters of the company and go over the vessels?

A. Sometimes they come to the headquarters and sometimes they meet you outside when you are under way.

Mr. Robinson: You may take the witness.

[fol. 70] Cross-examination.

By Mr. Baker:

Q. Mr. Foss, are you acquainted with—you have steamboat tugs, do you not, operated by steam?

A. Just one.

Q. How large is that steamboat?

A. It is a very small one.

Q. Over forty feet?

A. Yes, sir.

Q. It is over forty feet?

A. Yes, sir.

Q. Is it under sixty feet?

A. About sixty-five feet, I believe.

Q. Have you ever operated boats, steamboats, which carried freight or which were engaged in the business of carrying passengers for hire?

A. We have never operated a steamboat that carried freight and passengers for hire.

Q. You are familiar, of course, with the Federal steamboat inspection laws?

A. Yes, sir, very well.

Q. You know there is a man called the inspector of steamboats in Seattle?

A. I do.

Q. And there is an inspector of the boilers?

A. Yes, sir.

Q. And there is an inspector of hulls?

A. Yes.

Q. Have you ever made—it is customary, you know, do you not, Mr. Foss, that when a boat is put into operation, [fol. 71] that is, a steamboat, to make an application to the United States Service requesting that the boat be licensed?

A. Yes.

Q. Have you ever made an application for the license of any of your motor driven tugs?

A. Do you mean a license to own the vessel or——

Q. License to operate.

A. We have for all of them.

Q. I am not referring to enrollment and registration. I mean a certificate. Did you make an application for certificate of inspection?

A. Only where the Federal authorities inspect as a matter of custom or perpetration.

Q. As a matter of fact, that certificate is required from steamboats?

A. Yes.

Q. That is, in order to operate a steamboat, you have to have a certificate certifying that the boat has been inspected by the inspector of hulls, and by the inspector of boilers; isn't that true?

A. Yes.

Q. And it is necessary for you to apply for that certificate of inspection?

A. That is correct.

Q. Now, as a matter of fact, for any of your motor driven tugs you have never applied for a certificate of inspection, isn't that true?

A. We have never applied.

Q. Why haven't you applied?

[fol. 72] A. Well, they haven't interpreted the law to mean Diesel driven tugs.

Q. The inspectors of boilers and hulls, being inspectors of the United States government, have not, you say, interpreted the law to apply?

A. To motor driven tug-boats.

Mr. Robinson: We admit that the inspector of steamboats doesn't inspect motor driven boats.

Mr. Baker: Is some machinery required to be inspected?

Mr. Robinson: Some of it is.

Mr. Baker:

Q. As a matter of fact, Mr. Foss, you know, as a matter of inspection, the Federal authorities have never exercised or have never held themselves out to have the power to make that kind of inspection?

A. They never have to my knowledge, in this part of the country.

Q. Now, the inspector of hulls, as far as you know, has never gone aboard any of your boats to inspect for its seaworthiness?

A. Yes, whenever a vessel changes its name the law says the United States steamboat inspectors of hulls must inspect the vessel and report that she is seaworthy, and the matter of load line. I don't know whether that is the American bureau or steamboat inspectors inspect that way. So every vessel of ours, practically, that have had their names changed have been inspected by the United States inspector of hulls for seaworthiness.

Q. Will you tell me what section of the law you are referring to?

[fol. 73] A. I will have to—look under Change of Name, Mr. Robinson.

Mr. Baker:

Q. Mr. Foss, these steamboats are inspected annually?

A. Yes.

Q. As a matter of fact, one of your motor tugs could run twenty or thirty years if the name was not changed without inspection by the inspector of boilers or hulls?

A. That is true, but the Coast Guard will—(interrupted)

Q. We will get to the Coast Guard in a moment. As a matter of fact, don't you know it to be a practice for certain owners of boats to substitute their steam driven power to put motor power in the boats to avoid inspection by the United States government?

A. I know the opposite to be true.

Mr. Robinson: You keep saying by the United States government. I tell you we admit we are not subject to inspection by the steamboat inspectors. Confine it to steamboat inspectors. That is a misleading question, as you put it.

Mr. Baker: I have no intention to mislead Mr. Foss.

Mr. Robinson: I have no intention that you will.

Mr. Baker:

Q. I asked you that, for the purpose of avoiding inspection by the United States inspector of hulls and boilers, that is for seaworthiness and for the fitness of mechanical or boiler equipment, it has been the practice by owners of tugs operating in and around this state, to change the type of equipment they have to motor driven equipment for the [fol. 74] specific purpose of avoiding inspection by the inspector of hulls and boilers.

A. The answer is no, because Diesel driven vessels, for the most part, carry as many men as the law would require if under the steamboat inspection.

Q. I am talking about seaworthiness, mechanical equipment.

A. I think the Diesel vessels are more seaworthy than the steam driven.

Q. That is because of the man that owns the boats, and not because of more power to make them seaworthy.

A. I think that is true. I think you take better care of your property than a man appointed to take care of it for you.

Q. If you didn't have regard for your boat and the value of your boat and the safety of the people operating your boat, that boat could go along in an unseaworthy condition for a period of thirty years and there wouldn't be any power upon anybody to make you put that boat into seaworthy condition. Isn't that true?

A. It is practically true. It assumes a picture that isn't so, though. You could walk in front of a railroad train as it runs down the track, but normally you don't.

Q. Now, getting around to the United States Custom officials; that is, the Coast Guard service, the Coast Guard never uses the right of inspecting any of these motor driven tugs for seaworthiness of hull?

A. No.

Q. Now, do they go below decks to inspect the mechanical equipment, motor and such, boilers or tanks as necessary in the operation of the boat?

[fol. 75] A. They inspect the life-saving equipment and fire equipment.

Q. They don't inspect the mechanical equipment that drives your boat?

A. No. I don't know any reason they couldn't if they wanted to. If they thought it needed it. They are custodians of life at sea.

Mr. Baker: We ask the answer be stricken. We asked if they did it, and he said they didn't.

The Court: I think it may stand.

Mr. Baker:

Q. Mr. Foss, you are an attorney at law, aren't you?

A. I was years ago. I haven't practiced for sixteen or seventeen years.

Q. You specialized in Admiralty Law, didn't you?

A. Yes, for five years, six years.

Q. Do you know anything about the tug Winona?

A. Yes.

Q. That is your tug?

A. Yes.

Q. That boat was built in 1907

A. Something like that. I can verify it.

Q. Was it named Winona at that time?

A. Yes, sir.

Q. When did it sink?

A. Three or four years ago.

Q. 1933, approximately?

A. Yes.

Q. Was it named Winona at the time that it was built?

A. Yes.

[fol. 76] Q. As a matter of fact, that Winona never had an inspection for seaworthiness by the United States inspector of hulls from the time it was built until it sunk?

A. That one didn't. That was one of the few that didn't.

Q. Mr. DeLong was Captain of this Winona at the time she sunk?

A. Yes.

Q. Did you know at the time that this boat was sunk that it was in unseaworthy condition?

A. I didn't know it then; I don't know it now.

Q. Was it in unseaworthy condition?

A. No.

Q. If testimony were offered to prove the boat were rotten and unseaworthy at the time it was sunk, you would deny that?

A. I would deny it. I can show you the boat in Tacoma. She is in the shipyard and there hasn't been anything done to her since she sank.

Q. At the time she sank, was the water calm or rough?

A. I wasn't there. I don't know.

Q. What caused this boat to sink?

A. Well, I don't know.

Q. No collision?

A. She was abandoned by her crew, I think; and it was fairly rough. I haven't got detailed reports about her.

Q. You were the owner of the boat at the time it sunk?

A. Yes.

Q. And you would be interested in making a detailed investigation at the time it sunk?

A. I don't know why she sunk. She floated around all night after the crew left.

[fol. 77] Q. As a matter of fact, the boat was rotten and its seams leaking, and the crew had to leave?

A. No.

Q. Why did the crew leave the boat?

A. I can give you my theory. I can't give you facts. I wasn't there.

Q. What was your investigation as to the reason the crew left the boat?

A. Well, you want me to tell you why they left the boat?

Q. What did your investigation disclose as to the reason?

A. We brought the boat up and drydocked her and are going to start her out pretty soon, without much change.

Q. You say you made an investigation, is that right?

A. Yes, I did.

Q. Did the Captain report to you?

A. Yes.

Q. What did the Captain tell you was the cause for the boat sinking?

A. Well, he said she started to sink, started to make water, and he started his—I will get these facts now. He was out off the Straits of Juan de Fuca and that is a notoriously bad place for ground swells. I don't remember if he said it was very rough that night or not. The vessel started to make water, and he started the bilge pump and the belt on the bilge pump wouldn't work and the water gained on him slowly and a fish boat came by and he thought, as he was correct in doing, it was better to let a hundred boats sink than to risk anyone's life, and he got on the fish boat and went for help.

Q. The bilge pump wasn't open to inspection, was it?

[fol. 78] A. No. And the boat floated around all night and later it sank. We don't blame him for leaving.

Q. Is it ordinary that a boat will ship enough water for no apparent reason and sink?

A. Anything made by human beings sometimes leaks; strikes emerged objects by the fault of no one, and the leak commences.

Q. Did you have any proof the boat struck a submerged object?

A. No.

Q. It isn't the ordinary history that a vessel that is seaworthy will ship water and sink for no apparent reason?

A. Obviously no boat will sink without a reason. You are quite correct in that.

Q. Now, you keep, as the owner of the Diesel tugs, you keep next to current legislation which may affect your property and your boats?

A. We do.

Q. As a matter of fact, you know there is a bill pending before the United States Congress which has for its specific purpose the vesting of the power in the United States Government inspection service to inspect these boats and make them subject to the same inspection as steamboats?

A. There has been such a bill pending for years and years in one form and another.

Q. It isn't your contention or your opinion, Mr. Foss, that the United States government has the power to make inspections for hulls or boilers or for mechanical equipment in your boats; let's say boilers, pressure tanks and the like, [fol. 79] and doesn't exercise—— (interrupted)

A. Ask the question again.

Q. It isn't your contention that the United States government has the power to inspect; that is, the inspection service of the United States government, has the power to inspect your Diesel driven tugs for the purpose of ascertaining the fitness of the mechanical equipment, pressure tanks and the like, and also the seaworthiness of the hulls, and doesn't exercise it?

A. Well, that is a pretty long question.

Q. I will re-phrase it. I don't want to confuse you. In brief, I mean this: it isn't your contention that the Federal inspection service has the power to inspect these Diesel driven motor tugs for seaworthiness at all and for fitness of mechanical equipment, and yet does not exercise it?

Mr. Robinson: If the Court please, I object to the question unless counsel defines what he means by Federal inspection service.

Mr. Baker: That is the inspection for hulls and boilers.

Mr. Robinson: I can answer that.

Mr. Baker: You are not testifying.

Mr. Robinson: Neither does he testify his contentions. He isn't making contentions about anything.

Mr. Baker: He is the plaintiff here.

Mr. Robinson: You don't ask a plaintiff his legal contention.

Mr. Baker: He is an experienced lawyer, and he is the plaintiff and should be in the court knowing what he is contending for. I think if the Court thinks my question is not [fol. 80] a sound one from a legal point, he will say so.

The Court: The prayer of the complaint would show what he is asking for, would it not?

Mr. Robinson: Furthermore, it is determined by the law. It is a question of law and the law fixes it.

Mr. Baker: I would say this is purely a matter of law.

Mr. Robinson: I told you I wasn't going to contend the Federal steamboat inspectors have the right to inspect the hulls of the motor boats.

Mr. Baker: We won't get anywhere in the trial of the case arguing between each other. You haven't asked for a ruling on the question.

Mr. Robinson: I object to the question on the ground you used "Federal inspection service". If you state it "United States steamboat inspectors", it is plain.

Mr. Baker: I amended it.

The Court: He may answer, then.

A. In my opinion, the United States inspectors of hulls and boilers who work under the Commerce Department have not the authority to inspect the tugs under the so-called United States steamboat inspection laws.

Mr. Baker:

Q. Mr. Foss, along the lines of that question, are you contending, or rather is it your opinion as a lawyer and also as an operator of tug boats, that the Coast Guard service has the right and authority to inspect your motor driven tugs for fitness; that is, for seaworthiness and for fitness of mechanical propelling equipment?

A. Well, I certainly think the Coast Guard has the au- [fol. 81] thority to prevent the loss of life at sea and to do anything reasonable to carry out their commission in this world; and, under that general broad theory, in my opinion, the Coast Guard could and would stop us from sending a vessel to sea that would endanger the life of the crew.

Q. The Coast Guard doesn't require you to have your motor driven tugs inspected?

A. They do not.

Q. They don't do that?

A. Except under the power to save life at sea.

Q. There has been no attempt made by the Coast Guard service to adopt, to make set certificate?

A. No.

Q. Or to have you inspected for hulls and mechanical equipment?

A. No, they have not.

Q. Are you familiar with this bill which is now pending before the Federal Congress, this bill, copy of which I received from the Secretary of Commerce office upon the advice of Mr. Robinson that such a bill was pending?

Mr. Robinson: Which one have you? There are two of them. What is the number?

Mr. Baker: This is—it is a bill entitled "To amend section 4426 of the Revised Statutes of the United States, as amended by the Act of Congress approved May 16, 1906."

Mr. Robinson: I have copy of it here.

Mr. Baker: "Be it enacted by the Senate and House of Representatives of the United States of America in Con-
[fol. 82] gress assembled, That section 4426 of the Revised Statutes of the United States, as amended by the Act of Congress approved May 16, 1906, be, and the same is hereby, amended to read as follows:

'Sec. 4426. The hull and boilers of every ferryboat, canal boat, yacht, or other small craft of like character propelled by steam, shall be inspected under the provisions of this title. Such other provisions of law for the better security of life as may be applicable to such vessels shall, by the regulations of the board of supervising inspectors, also be required to be complied with before a certificate of inspection shall be granted, and no such vessel shall be navigated without a licensed engineer and a licensed pilot; Provided, however, That in open steam launches of ten gross tons and under, one person, if duly qualified, may serve in the double capacity of pilot and engineer.

'That from and after three months after the date of the approval of this Act, all towing vessels, and all vessels of above fifteen gross tons propelled by machinery, the propulsion power of which is other than by steam, carrying freight or passengers for hire, shall be subject to all of the provisions of the law relating to steam vessels, insofar as they may be applicable thereto'.

"Sec. 2. That all laws or parts of laws insofar as they are in conflict with this Act are hereby repealed."

The question was whether or not you are familiar with that particular statute.

[fol. 83] A. I can't say I am. I know there are two or three laws pending that we rather favor.

Q. Rather than a statute, I meant a bill.

A. Yes. We rather like the Federal steamboat inspection service.

Q. Pardon me——

A. We favor the extension of the Federal steamboat inspection service.

Q. Do you subscribe to the Marine Digest?

A. I believe I do, yes.

Q. Mr. Foss.

A. Yes.

Q. Have you read the March 2nd, 1935, issue thereof?

A. If you show it to me, I can tell you if I have or not.

Q. It is the issue containing an article by the Secretary of Commerce, Daniel C. Roper, to Senator Copeland with, pertaining to legislation, or proposed legislation, relative to shipping.

A. I am sorry, I didn't read that, but I will gladly read it if you will hand it to me.

Q. As long as you haven't read it, I suppose I couldn't very gracefully interrogate you on its contents, Mr. Foss. Mr. Foss, the Customs inspectors of the United States Customs Bureau have never, have they, inspected your motor driven tugs for the purpose of ascertaining the seaworthiness of hull or the fitness of mechanical equipment?

A. They have sent the United States steamboat inspectors out to inspect the hulls when the names were changed.

Q. They haven't made any periodical inspection, annually or otherwise?

[fol. 84] A. No, sir.

Q. Or made you apply for a certificate of inspection?

A. No, but we would be glad to do so.

Q. There isn't any agency of the Federal Government which has required you to apply for a certificate of inspection for these motor driven tugs?

A. Not as a steamboat, but they inspect us all other ways; when it is built, and the whistles blown, and the maneuvers, and the fire extinguishers and the life-preservers.

Q. The question I put to you was whether or not any agency of the Federal government had ever required your motor driven tugboats to be inspected annually, or to have you apply for a certificate of inspection as to it's fitness for any particular purpose.

A. Well, I will state this. The United States steamboat inspectors of hulls and boilers have not required us to apply for inspection of the Diesel boats and tugs.

Q. Has any other investigation been made by the government?

A. Just the sea guard to inspect us on the sea or the dock, as I stated before.

Q. When they board you at sea, they look over the superficial equipment above decks, life-boats, fire extinguishers and lights, and so forth?

A. That is right, and they report people for infraction of the navigation laws.

Q. Do they attempt to supervise the life-boats you require?

A. They do life-preservers, lights, and fire extinguishers. I don't know about boats.

Q. I think they see if—they require just one life-boat? [fol. 85] A. I think they just see it is.

Q. As to personnel on your motor driven tugs, nobody has supervision on the part of the National government as to how many people shall be on your boats, or as to whether or not any member of the crew shall be a licensed officer, or examined for his qualifications?

A. No, not on tug boats. Not on motor driven tug boats.

Mr. Baker: That is all.

Mr. Robinson: That is all, Mr. Foss.

(Witness excused.)

(Whereupon a recess was taken for fifteen minutes. Upon reconvening, the following proceedings were had:)

Mr. H. T. Shaver, being a witness called on behalf of plaintiffs, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson: The Court and counsel please, I have two clients here, I didn't know the details at the time I drew the Complaint, and in spite of my stipulating, I want to call them briefly.

Q. Your name is H. T. Shaver?

A. Yes, sir.

Q. Of the Shaver Transport Company of Oregon?

A. Yes, sir.

Q. It is an Oregon corporation?

A. Yes, sir.

[fol. 86] Q. Are you an officer of the company?

A. Yes, sir.

Q. What officer?

A. General manager.

Q. Where do you live?

A. Portland.

Q. You operate about seven large steam tugboats?

A. Yes, sir.

Q. And you have about ten motor driven tugboats?

A. Yes, sir.

Q. If my information is correct, the only one of those tugboats, that is, of the motor vessels, that has a gross tonnage of more than a hundred tons is the M. S. Shaver?

A. Yes, sir.

Q. She is longer than sixty-five feet?

A. Yes, sir.

Q. Do you recall what others of the tug boats are longer than sixty-five feet? The Smith would be, I guess, and I guess the James W.

A. There are probably five or six longer than sixty-five feet.

Q. What sort, or does your company do any towing between Oregon and Washington?

A. Yes, sir, practically ninety percent of our business is between Oregon and Washington.

Q. Between Oregon and Washington?

A. Yes, sir.

Q. Across the Columbia River?

A. Yes, sir.

[fol. 87] Mr. Robinson: I think that is all.

Cross-examination.

By Mr. Baker:

Q. Mr. Shaver, are you familiar with the publication called the Marine Digest?

A. Yes, sir.

Q. That publication is accepted in marine circles as a reputable magazine; I mean, it is recognized as a publication that has considerable circulation, is that true?

A. I don't know. I very seldom see it.

Mr. Robinson: I don't think that would have anything to do with his cross examination. You had better try that with somebody else, don't you think? All I have asked him is as to what boats he has and what they do.

Mr. Baker: I think, as a matter of fact, questioning about the boats and size and capacity and business opens up a whole field.

Mr. Robinson: It hardly opens up anything that appeared in the Marine Digest unless it applied to those particular boats.

Mr. Baker: I waive the question; although I am convinced of the soundness of my position, I don't think it is worth arguing about, so I withdraw the question.

Mr. Robinson: That is all.

Mr. Baker: Just a moment, please.

Q. Where do your tugs run from, Mr. Shaver?

[fol. 88] A. Their home port is Portland and they operate on the waters of the Columbia River, touching at Washington and Oregon points from Astoria to The Dalles.

Q. How much of your motor tugboat business, if you can segregate as to what is done with motor driven and steam driven tugs, is done between Oregon and Washington?

A. At the present time all of our towing activities is conducted by motor driven vessels, and I would say that sixty-five percent of our towing business is between Oregon and Washington.

Q. How much of your towing business is done between points, that is directly between points, on the Washington shore of the river, that is from Vancouver down the river, or the other way around, but between ports in Washington, on Washington territory?

A. Well, fifty percent of our towing business is from Washington ports to Oregon ports.

Q. How much is it from Washington ports to Washington ports?

A. Well, I would say that about twenty percent.

Q. How much of the time, Mr. Shaver, are your motor driven tugs, what proportion of the time are your motor driven tugs in Washington waters?

A. In Washington waters?

Q. That is, on the Washington side of the river?

A. That is kind of hard to say, Mr. Baker, because on

the Columbia River the tow boats go over what they call tow grounds and try as near as possible to keep out of ship channels and are crossing continuously back and forth across the ship channel, and in Oregon territory and then [fol. 89] across to Washington waters.

Q. As a matter of fact, your boats are, for a substantial portion of the time, that is, your motor driven tugs are operating for a substantial part of the time in Washington waters?

A. Yes, they do.

Redirect examination.

By Mr. Robinson:

Q. I take it from what you say, towing from one port in Washington to one in Washington, a tug might cross the water two or three times in Oregon waters and back again?

A. That is right.

Mr. Robinson: That is all.

(Witness excused.)

Mr. H. W. Britts, being a witness called on behalf of plaintiffs, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. What are your initials, Mr. Britts?

A. H. W.

Q. You are president of the Knappton Towboat Company, are you not?

A. Yes, sir.

[fol. 90] Q. Is that a Washington corporation?

A. It is.

Q. Where is its actual place of business, its headquarters?

A. Headquarters in Astoria.

Q. Astoria, Oregon. You also have about six or eight large steam tugs?

A. Yes.

Q. Have you any Diesel tugs of over a hundred ton burden?

A. There is only one that might be.

Q. Which is that?

A. The Melville.

Q. Ninety-three, according to your letter.

A. There are some of those details I couldn't answer. My primary business is logging, and not tugging.

Q. Do you remember writing me a letter in December about this?

A. I wrote the letter.

Q. You secured the correct information at the time you wrote the letter?

A. Yes, that is what I wrote.

Q. At that time you stated they were ninety-three tons. They were your biggest boats.

A. Yes, sir.

Q. You have two out of five that are longer than sixty-five feet?

A. It figures that.

Q. And the rest are under. Do your vessels go back and forth between Washington and Oregon?

A. Yes, sir.

Q. All of them?

[Vol. 91] A. Yes, sir.

Q. Well, confine it to Diesel tugs mostly. Do they engage in traffic across the river between Washington and Oregon?

A. Yes, sir.

Q. Much of the time?

A. Well, they are about as much in one state as the other. I mean the total length of the river, and naturally touching both territories going down the river.

Q. Even if she were towing between an Oregon port and another Oregon port, she would get in Washington waters?

A. Yes, sir.

Q. And if it were towing between a Washington port and another Washington port, she would get in Oregon waters?

A. Yes, sir.

Q. But there is considerable traffic from a port in Washington to a port in Oregon and vice versa?

A. Yes, sir.

Q. Do you take stuff across the river from one state to the other?

A. Yes, sir.

Q. About how much of the traffic is that kind, do you think?

A. About half of it.

[fol. 92] Cross-examination.

By Mr. Baker:

Q. What did you say was the——

A. Knappton Towing Company.

Q. I am sorry, but I don't believe I recall the number of motor tugs you said you had.

A. Mr. Robinson has the detail there.

Mr. Robinson: Five.

A. As I said before, I don't have details of the information at hand. I had to get it from someone else.

Mr. Baker:

Q. Can you estimate the percentage of the time that your boats are in Washington waters, your motor driven tugboats?

A. About half the time along the length of the river.

Mr. Baker: No more questions.

(Witness excused.)

[fol. 93] Captain Lindley Davis, being a witness called on behalf of plaintiffs, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Captain Lindley Davis, you have been engaged in the tugboat business for a long time, haven't you?

A. Yes, sir.

Q. How long?

A. As an operator twenty-one years.

Q. What company are you connected with actively at present?

A. Puget Sound Tug and Barge Company.

Q. That is one of the plaintiffs in this case?

A. Yes, sir.

Q. And has quite a number of vessels involved?

A. Yes, sir.

Q. How many of your motor driven vessels are over a hundred tons burden?

A. I think two, if I am correct, two or three.

Q. The Gillette and what is the other one?

A. The Douglas.

Q. You are building one at the present time, are you not, another one?

A. Yes, sir.

Q. That will be over a hundred tons?

A. Yes, sir.

Q. And the rest of them are smaller vessels?

A. Yes, sir.

Q. Do any of your vessels go to the Dominion of Canada?

A. Yes, sir.

[fol. 94] Q. Do you go in to the Columbia River?

A. Yes, sir.

Q. To California?

A. Yes, sir.

Q. Especially these big fellows?

A. Yes, sir.

Q. Do the Coast Guard from the Custom House ever come aboard to look around your vessel?

A. Yes, sir.

Q. What do they do, in a general way?

A. They inspect them as to the lights, that they carry the proper lights and fog horns and whistles and life-preservers and fire extinguishers and things of that sort. Check the names and official numbers.

Q. They make no separate inspection of the hull?

A. No.

Q. Have you had that experience recently?

A. Yes.

Q. Tell us about it.

Mr. Baker: We don't question the fact the Coast Guard comes aboard and makes these inspections as that is the custom.

Mr. Robinson: All right, we will shorten this as much as we can.

Q. Do the Coast Guard and Customs people do substantially the same thing?

A. Yes, sir.

Q. Do they come around with any regularity at all?

A. No.

Q. What is this officer we run into in the Commerce re- [fol. 95] ports called, a navigation inspector?

A. I was told by them they were navigation inspectors.

Mr. Baker: We object to what the witness is told as being hearsay evidence.

The Court: If the inspector represented himself as such, I don't think it is hearsay.

A. He wore the badge of a customs officer and said he was a navigation inspector. The first time I had him designated as such was last summer. There was two of them delegated for about two weeks on watch at the slip in our office, and they said they were designated as navigation inspectors.

Mr. Robinson:

Q. Captain, what is a naptha launch?

A. It isn't.

Q. Never?

A. It used to be.

Q. You used to have an animal called a naptha launch?

A. It was something they had before gas line, to the best of my knowledge. It was used for some kind of fuel.

Q. Anyway, there are no more naptha launches?

A. I think they used it for oil to make steam.

Q. There are no more such launches either, are there?

A. Not that I know of.

Q. Were you in this state at the time this law of 1907 was passed?

A. Yes, sir.

Q. Do you know whether or not there was a navigation inspector appointed under that law or worked under it the early years after it was passed?

[fol. 96] A. There was a State inspector.

Q. Did he inspect vessels on Puget Sound?

A. No.

Q. Where did he inspect?

Mr. Baker: We object to the question as immaterial and not covering the scope the law covers. It must be construed from the law itself.

The Court: I think there is some competency in the construction the Department places on the law.

Mr. Robinson:

Q. Do you know whether or not there was a navigation inspector that made inspections?

A. There was. I knew him very well, Captain Hoyt. Inspected on Lake Chelan and Lake Whatcom and Lake Union and, I believe, Lake Crescent afterwards.

Q. Would you be able to say what years that was?

A. If my memory is right, it was about 1909 when Captain Hoyt was inspector.

Q. From 1909 and Lake Union in the center of Seattle was an inland lake and not connected with the navigable waters?

A. Yes, sir.

Q. And since the Canal went through it comes under Federal jurisdiction?

A. Yes, sir.

Q. Did you ever know Captain Hoyt to assert the right to make inspection of any vessel operating on the waters of the United States as distinguished from the land-locked waters of the lake?

[fol. 97] A. No.

Mr. Robinson: You may take the witness.

Cross-examination.

By Mr. Durham:

Q. You don't know what naptha is at all, you say?

A. I couldn't give an accurate definition, I don't believe. I have never handled it or been on a boat that was a naptha boat.

Q. It is just a high test gasoline, isn't it?

A. I thought it was a low test gasoline.

Q. A naptha launch was internal combustion engine driven by this low or high test gasoline.

A. My idea was a boiler they burned naptha in.

Q. You don't know what you are talking about?

A. Maybe not.

Mr. Robinson: Mr. Durham, a naptha launch is a steamboat.

Mr. Durham: I dispute that.

Mr. Robinson: That is the first kind of a launch the Foss Company had and we can enlighten you on that.

Mr. Durham:

Q. How long did you say you had been in the towboat business as an operator, twenty-one years?

A. As an operator, twenty-one years.

Q. What percent of your business is from a point in Washington to a point in Washington?

A. Well, that varies. Today, a hundred percent of it, I think; but it varies with the needs of the business.

[fol. 98] Q. And always a very large percent was on the waters of Puget Sound from a point in Washington to a point in Washington?

A. There were a number of years that the major part of our business was in British Columbia, during war time.

Q. Since the war, though, it has been largely here?

A. Yes.

Q. And now it is a hundred percent here?

A. Nearly so. I think they told me in the Anacortes office they had one boat on the way to British Columbia today.

Q. It is the larger boats you send to British Columbia through the waters of the Straits?

A. No; we send some of the smallest.

Q. How long since you have sent a tug to California?

A. Possibly once a year.

Q. That would be one of the steam tugs?

A. Not always. Sometimes it would be steam and sometimes a motor.

Q. When did you last send a tug to California, if you remember?

A. I think it was nearly a year ago. I can't recall definitely.

Q. What tug went down there?

A. The Cleo, steam tug.

Q. When did you last send a motor tug down?

A. I don't think for three years.

Q. How about the Columbia River; when did you last send a tug down the Columbia River?

A. I think last summer sometime.

[fol. 99] Q. Steam tug?

A. Yes.

Q. When did you last send a Diesel or motor driven tug?

A. I don't think I have had one in there for two years.

Q. These would be the very large ones only you would send out to sea?

A. Depending on what the tow was. Ordinarily when we go down there it is a large tow.

Q. An ocean going tug?

A. Yes.

Q. You say some navigation inspectors inspected your boats last summer?

A. Yes, sir.

Q. Did they inspect the hulls?

A. If they did, I didn't know it.

Q. Did they inspect the machinery?

A. Not that I know of.

Q. They went aboard to see if you had posted your navigation rules, didn't they?

A. And other things, not only navigation rules. Some of them don't require them to be posted.

Q. Did they give you certificates of inspection as to those matters?

A. No.

Q. It wasn't at all formal, then?

A. No, perhaps it isn't formal unless they give notice you are fined. If they are not all right.

Q. What do they look at?

A. Life-preservers, fire axes and extinguishers, and lights.

[fol. 100] Q. Look at the name?

A. Yes. And the official number and the tonnage.

Q. And that is all?

A. As far as I know.

Q. Didn't inquire as to your crew?

A. No.

Q. As to the training and experience of your personnel?

A. No, sir.

Q. Whether you had a Captain on the boat properly?

A. Yes, they looked at the papers to see.

Q. As a matter of fact, on these Diesel boats, anybody can take one out if he signs it as a Captain?

A. No, sir.

Q. What test does the United States government give, or examination, to qualify a man to run a Diesel tug?

A. He has to be an American citizen.

Q. Anything else?

A. Not that I know of.

Q. Any American citizen, then, if he signs as Captain, can take one out, as far as the United States is concerned?

A. Yes, sir.

Q. Anyone in this room that is a United States citizen could sign as your Captain on the boat and run it?

A. He could attempt to.

Q. As far as the Federal government goes?

A. Yes.

Q. Now, have you ever applied to the Federal Government for an inspection of the hull of any Diesel tug of yours?

[fol. 101] A. No.

Q. Or of the machinery or equipment?

A. No.

Q. Aside from the time when you have first had them built or have changed the name, has any official of the Federal government ever inspected any of your hulls or your machinery?

A. I don't think so.

Q. Now, when a boat is first built, customs officers, I think you said, go aboard and take a look at her and measure her?

A. Yes, sir.

Q. Have an ad-measurer who measures the hull to find out how long it is and what the tonnage is?

A Yes, sir.

Q. The purpose of that is to determine the size of the vessel for purposes of classification, isn't it?

A. I presume so. I don't know definitely what the purpose it. They can list it, I presume, as——

Q. And the same is true of when you change a name, they go aboard to find out how big the boat is for purposes of classification?

A. I don't believe they have to measure them for the change of name. If they do, I didn't know it.

Mr. Durham: That is all.

Mr. Robinson: If the Court please, could I have just a minute yet? I have a witness that wants to go to Portland.

Mr. Baker: I have three inspectors from the United States Government. They have left their office entirely [fol. 102] deserted and they are very eager to get back. I was wondering whether or not—I will be very brief with them and I was wondering if we could take them before adjournment for lunch. I hesitate to impose on the Court to that extent.

Mr. Robinson: I am willing to accommodate the inspectors if possible, but there will be a long cross-examination. I am willing to give you the right of way and stop my case and let you go on, but I must warn you there will be considerable cross-examination.

Mr. Baker: Under those circumstances, I think we had better wait until we adjourn. I have no objection to your taking the witness.

(Witness excused.)

Mr. H. T. Shaver, being a witness recalled on behalf of plaintiff, having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Someone spoke to me about a matter that the Coast Guard refused you permission to navigate some boat at one time. Was there such a circumstance?

A. We purchased a vessel at—on the Oregon coast, on the Coast at Bandon, Oregon, and we were going to bring the motorship under her own power, so before we started [fol. 103] out, the Coast Guard inspector of that district came aboard the vessel and notified our crew that we could not proceed to sea until certain alterations were made in her and she was made more seaworthy.

Q. What sort of alterations?

A. We had to board up a number of windows and put a toothpick over the bow and reinforce some of the hull. They said if we didn't do that, she wasn't seaworthy and

we had to take her under tow in envoy and we said we didn't know what authority he had and he said she was an enrolled vessel of the United States and, until we did that, he would put a watchman aboard and keep her there.

Cross-examination.

By Mr. Baker:

Q. As a matter of fact, somebody made a complaint relative to the seaworthiness of that vessel, did they not?

A. No, sir.

Q. There is a regulation of the United States Government, I think there is a statute provides where a complaint is made relative to the seaworthiness of the vessel, the Coast Guard has power to assume for inspection for seaworthiness.

A. I can't say. They exercised it in that case.

Q. Do—it was your opinion that they didn't have the power?

A. Yes.

Q. You didn't contest, however, their power by trying to get out?

[fol. 104] A. No.

Q. Who was the inspector?

A. The Commander of the Coast Guard at Bandon, Oregon.

Q. Do you know his name?

A. No, I don't. It has been ten years ago.

Q. That is the only time in your experience as a tugboat operator that anything like that occurred?

A. Yes, sir.

Q. You have never heard of another case where the United States Coast Guard attempted to regulate the seaworthiness?

A. I never did.

(Witness excused.)

(Whereupon an adjournment was taken until one-thirty p. m. Upon reconvening, the following proceedings were had and testimony taken, to-wit:)

Mr. Baker: If the Court please, I don't know whether or not Mr. Robinson has completed his case, but at this

time I would like to deviate from the normal course of procedure if Mr. Robinson will agree, and offer the testimony of the United States inspection service because, as I said before, these men are anxious to get back to Seattle.

Mr. Robinson: That is a little out of order, but it is all [fol. 105] right, except this, I said I wanted to cross examine these gentlemen; not so much cross examination as I want to examine them on my own part. The idea is that Captain Hutchins is qualified on the law of the United States and examining him directly will save reading the statutes. I am willing to have him called on what you may ordinarily call cross examination, you would call my own examination. I have some other witnesses, but I will make room so Captain Hutchins may get back.

Mr. Baker: We will call Mr. Oscar Dam at this time. The record will show we are deviating from the normal course of procedure to offer part of the defense.

Oscar W. Dam, being a witness called on behalf of defendants, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Baker: At this time we would also like to reserve our right to move at the completion of the plaintiff's case. We are offering this testimony, of course, subject to our reservation as to demurrer.

Q. Your name?

A. Oscar W. Dam.

Q. You are an employee of the Federal Government? [fol. 106] A. Deputy in charge of Marine Division, Federal Government.

Q. Your office building?

A. Federal Building, Seattle.

Q. You are under the Treasury Department, are you not?

A. I am.

Q. The Coast Guard is also under that department?

A. The Coast Guard is a separate department. Bureau of Coast Guard and Bureau of Customs.

Q. Will you state what inspection service of the United States Government maintains for the inspection of vessels?

A. Well, you refer to inspection of vessels by the steamboat inspection service?

Q. What I asked, what instrumentality of the Government maintained for the inspection of boats of any sort and description.

A. United States steamboat inspection service. It is now termed Bureau of Investigation and Steamboat Inspection.

Q. Do they maintain any other service for the inspection of vessels?

A. None with the exception of the American Bureau of Shipping, load line act and the load line treaty of 1930.

Q. Is there any tonnage connected with their——

A. Under the load line act the vessels of 250 gross tons, or larger, operating on foreign voyages, and under the International Treaty, reduced to 150 gross tons, and the sheltered waters between Port Angeles and Sitka have been included.

Q. They don't regulate in Puget Sound?

[fol. 107] A. Vessels between Seattle and Victoria wouldn't be required to be inspected and carry a load line certificate.

Q. Will you state whether or not this inspection that is made under the International, under the load line, state whether or not that is made at any stated intervals as a regular inspection, or upon request.

A. Any—before a vessel can clear on a foreign voyage outside of the sheltered area, if the vessel is of 150 gross tons or larger, must be inspected by a measurement society like the American Inspection Society and carry a load line certificate. And if they are not inspected and have the certificate, the penalty is $500.00.

Q. Do Diesel tug boats get inspected under this service?

A. All vessels of 150 gross tons or larger.

Mr. Baker: Mr. Robinson, are any of your tugs in question over 150 tons gross?

Mr. Robinson: Yes, one, the Shaver. Just a minute, I will tell you accurately. I have them down here. The M. S. Shaver belonging to the Shaver Company is 420 tons gross. The Arthur Foss, belonging to the Foss Launch and Tug Company is 225 tons gross; and there are no others over 150.

Mr. Baker: Are those steam or Diesels?

Mr. Robinson: They are Diesels.

Mr. Baker:

Q. State from your own knowledge, if you have such a knowledge, whether or not the Federal Government in-
[fol. 108] spects Diesel tug boats under the size of 150 tons for seaworthiness of hull and for fitness of propelling machinery.

A. It does not.

Q. Does the Federal Government attempt to regulate the size of the crew on these motor run tugboats?

A. Well, that is part of the other question. If we don't inspect them, we wouldn't have anything to do with their crew.

Q. Does the Federal Government require that there be any licensed officers upon these motor tugboats?

A. None.

Q. The Federal Government, however, the Customs Service, does inspect the boat at the time of its first original construction, does it not?

A. We don't use the word inspect; we use the word admeasure.

Q. What does the term mean?

A. The ad-measurement of vessels is done with the idea of establishing the correct width, length, breadth, and correct gross tonnage, and exceptions from the gross net tons are the lockers and the officers' quarters and like that are deducted. We have to establish the correct dimensions of the boat and it is done in the form of ad-measurement certificates and that information is used to issue a marine document to the boat.

Q. The marine document being a certificate of registration or enrollment?

A. Yes, sir, and it is used as a basis for Panama or Suez Canal certificates to collect tolls.

[fol. 109] Q. Will you state whether or not, at the time such inspection is made, any attention is directed as to whether or not the boat is seaworthy?

A. None whatever.

Q. Is there any inspection made of its machinery to determine its fitness at that time?

A. No, we have no jurisdiction over machinery.

Q. This testimony you have offered concerns itself with all vessels, is that what you were talking about, of all sorts or descriptions, or motor tugs?

A. The testimony relating to ad-measurement relates to all tugs.

Q. Will you state from your knowledge whether or not the Government at any time has any inspection service of any sort, any character, from the time a boat is built; that is, until the time a boat meets its decease, with reference to motor, Diesels, less than 150 tons gross, whether the United States Government ever, at any time, ever has any inspection for hulls, seaworthiness of hulls, or fitness of machinery?

A. Absolutely none.

Q. Will you state whether or not the United States Government requires these motor tug boats carry any life boats?

A. Well, life boats are always required by certificates of inspection. These vessels are not inspected and naturall wouldn't have to carry life boats pursuant to the regulation.

Mr. Baker: I think you may take the witness.

[fol. 110] Cross-examination.

By Mr. Robinson:

Q. Mr. Dam, you said a little while ago that no motor vessel under 150 tons was inspected as to her hull. You didn't mean that did you?

A. Just as to seaworthiness of hull, yes.

Q. What do the steamboat inspectors inspect for if it isn't for seaworthiness of hull?

A. You are referring to steamboats?

Q. He asked you all Deisel boats.

A. I think you made—if the motor boats of 150 tons or larger for hire are required to be inspected for——

Mr. Baker: My question was directed to tug boats and all those motor boats other than those which carry passengers for hire or freight for hire.

A. I didn't understand your question correctly.

Mr. Baker: My question was directed and, since we are only concerned in this suit with tug boats, my question was directed to motor tug boats.

A. That is what I understood that it was.

Mr. Robinson: We are concerned with more than tug boats. I said at the beginning this law was so full of — I was going to challenge it from——

Mr. Baker: I don't think you can challenge the constitutionality other than as to your particular complaint in this action. The law is well established the only individual to challenge the constitutionality of a law is the one involved.

[fol. 111] Mr. Robinson: I can say if the law is unconstitutional all the way through it bears on the constitutionality.

The Court: I am not going to restrict the record in a case like this where there is a real question. I think either party may develop the record very much as he sees fit so there will be a final determination of it on appeal.

Mr. Robinson: Mr. Baker, I don't think I am quite clear yet what Mr. Dam's testimony is. There is a mistake there somewhere.

Mr. Baker: I will re-phrase the question and ask it.

Mr. Robinson: Yes.

Mr. Baker:

Q. In order to make my position clear, the question I asked you, Mr. Dam, was directed to, along these lines, I can't re-state it exactly as I had it before, because I don't recall it myself, What I want to know is whether or not there is any inspection service by the United States Government upon motor tugs engaged in the business of towing, for the purpose of inspecting the seaworthiness of the hull and the fitness of mechanical contrivances that operate it under 150 tons gross.

A. No.

Mr. Baker: That is all.

Mr. Robinson: You are confining it to tugs now?

Mr. Baker: Yes.

Mr. Robinson:

Q. Is there any Federal inspection of any kind with reference to such tugs?

[fol. 112] A. Well, only to those tugs under the load line act of 150 gross tons or larger.

Q. You are under the Treasury Department?

A. I am.

Q. Do you pay any particular attention to the Department of Commerce reports and regulations?

A. Well, ninety-five percent of my work is for the Department of Commerce.

Q. You are familiar with the motor boat act of 1910 covering all motor driven vessels under 150 feet in length?

A. Yes, sir.

Q. The act of that is, by law devolves upon the Secretary of Commerce, does it not?

A. Yes, and collector of customs.

Q. Just to refresh your recollection on that, reading from the motor boat law, "The Secretary of Commerce and Labor shall make such regulations as may be necessary to secure the proper execution of this act by collectors of customs and other officers of the Government."

A. That is right.

Q. And "The secretary of the Department"—well, that is sufficient. Are you familiar with what regulations have been made?

A. I have them before me here.

Q. You know, then, if you have them before you, that the Department of Commerce, through the Bureau of Navigation, maintains five vessels called inspection vessels, to enforce the law?

A. Yes, sir.

[fol. 113] Q. None on this coast?

A. We use navigation inspectors here.

Q. What is a navigation inspector?

A. During the period from Decoration Day to Labor Day the Department of Commerce authorizes the Department of Customs to employ men to assist in the enforcement of the navigation laws, particularly the law that relates to the starting of motors on ferry boats before the boat is tied up and this act you referred to of 1910 and the number of motor boat—law of July 17, 1917, or any navigation law.

Q. Not having—what do they do, detail some of the local men for the time being for that, or send men from Washington?

A. The Collector of Customs generally appoints two people of the sea-faring fraternity. Last year, on account of the Customs inspectors not being too busy, we asked the

Department of Commerce to use them and they reimbursed their salaries.

Q. What do they do?

A. They board the boats to see we have life preservers, fire extinguishers, fog-horns and whistles and bells for instance, on the boat.

Q. You say they see if you have life preservers and also see if you have the kind required by Federal laws?

A. Yes, sir.

Q. Do they do that on any boat?

A. Any boat less than sixty-five feet in length, yes, sir.

Q. They also inspect that vessel to see if you have the right kind of lights, as required by Federal rules?

[fol. 114] A. No, all violations of lights have to be between sunset and sunrise. If they are doing it after sunset they inspect that.

Q. Wouldn't they see if you have the right light equipment?

A. No, because if the vessel didn't have light equipment you couldn't find them.

Q. Who looks at the lights?

A. The Coast Guard are charged with that, or Customs inspectors of launches or navigation inspectors of launches.

Q. How many Customs men have you in this district, in the Washington district?

A. There are 153 in Seattle and, I suppose, about 218 in the whole district.

Q. Mr. Dam, I understand that the Washington Customs district comprises all of the state of Washington except the north bank of the Columbia River. That runs to the big bend.

A. Well, the district of Washington has the state of Washington and the state of Oregon has the north bank of the Columbia River where it forms the boundary.

Q. Longview would be in the Oregon district?

A. Yes.

Q. So you have a very small part of the Columbia River part?

A. We haven't any of the Columbia River except where it leaves the state of Oregon.

Q. You say you have 153 in Seattle?

A. Yes.

[fol. 115] Q. And how many in the state at large?

A. About 218, I think.

Q. Now, Mr. Dam, any one of those you have mentioned, 218, or whatever it is, has the authority by law to board a vessel and check up on her?

A. Absolutely; anywhere in the United States.

Q. Anywhere in the United States four Marine leagues off the Coast, isn't it?

A. That is right.

Q. Mr. Dam, do you know how many Coast Guard vessels are maintained in this district?

A. No, I don't, but I imagine quite a few.

Q. You have a general idea of it, haven't you?

A. We have large Coast Guard vessels and a lot of small ones assigned to the principal ports.

Q. Those Coast Guard vessels can stop any vessel and inspect her for questions of whether she has got the proper fire apparatus?

A. They can inspect her for any law, any navigation law.

Q. Any navigation law, generally speaking?

A. Yes.

Q. That includes lights and pilot rules and fire extinguishers——

A. Pilot house rules, master of regular board of customs, and the name on the document and the number on the beam and the name on the bow.

Q. Aren't there about twenty-five of those vessels, counting the large and the small, in these waters?

A. I imagine there would be all of that.

Q. What books have you with you there, Mr. Dam?

[fol. 116] A. Well, I have the Navigation Laws of the United States by the Bureau for four years and I have all of the steamboat inspection books. This is the Laws of Steamboat Inspection published by the Bureau. In addition to that, I have — copy of the Act of June 7, 1918 relating to the relation of the Secretary of Commerce and the Act of June 10, 1910, relating to the equipment of motor boats. And I brought up sample copies of the various marine documents we issue, certificates and licenses, because I thought the Court might care to see them.

Q. Mr. Dam, are these blank documents documents we might keep without inconveniencing you?

A. Yes, I brought them for that purpose.

Mr. Robinson: I ask they be admitted in evidence, blank certificates of enrollment and registration and yacht license.

(Blank forms of enrollment, registration and license admitted in evidence as plaintiff's exhibit 1.)

Mr. Robinson:

Q. Mr. Dam, do you happen to know how many merchant vessels there are in the United States?

A. I believe it is 350,000. I have the exact number in the office, but I——

Q. Do you happen to know how many motor boats there are in the United States?

A. Well, I would imagine about 120,000, but I would have to give that as a guess.

Q. Do you happen to know how many vessels are in- [fol. 117] spected by the United States steamboat inspection service each year?

A. I would have that statistics in the office, but the steamboat inspectors would be in more with that.

Mr. Robinson: That is all.

Redirect examination.

By Mr. Baker:

Q. Just a moment, please. When you said that all these inspectors, all these Government officials, referring to Customs and Navigation inspectors, had the power to board a boat and check it up, you didn't mean to infer, did you, that they had the power to inspect for hulls and machinery on motor tugs, did you?

A. I did not. The only two inspections that we have are by the steamboat inspection service for vessels required to be inspected by law, and those vessels of 150 gross tons operated on foreign voyages outside this sheltered area.

Q. State whether or not these navigation officers or Coast Guards, if you know, have the power to require a motor tug under 150 tons to carry licensed officers.

A. Motor, you are referring to motor tugs, no.

Q. Yes.

Mr. Robinson. We concede they haven't.

A. No, they haven't.

Mr. Baker: If you will concede the navigation officers don't have the right to make regulations not provided by statute——

[fol. 118] Mr. Robinson: I will say they don't have power to require licensed officers on tugs, especially under sixty-five feet.

Mr. Baker:

Q. Do they have the power to require licenses on tugs and motor vessels over sixty-five feet?

A. No, they haven't any power.

Q. Do they have the power to require these navigation officers we have been speaking of, to require a certificate of inspection by any motor tug regardless of size, over 65 feet, but under 150 tons?

A. The only people that require certificates of inspection are steamboat inspectors. They have to inspect the vessels and if they don't have a certificate of inspection, any officer of inspection, Coast Guard or navigation inspectors, can make a report to the inspectors and fine them $500.00.

Q. Isn't it fair to say these men merely have the power to see these particular provisions of the statute are enforced, and don't have a right to make regulations not included in the statute?

A. They are working to enforce the statutes of 1915 and 1917, the Act of June 17th, 1897 requiring pilot rules, two copies of pilot rules to be posted and the section 4472, as amended, covering the operation of ferries or other vessels carrying automobiles where the automobiles are started before the vessel is made fast.

Q. One more question. Do you know whether or not, or state, if you know, your own knowledge, whether or not the United States Coast Guard has the authority to detain [fol. 119] a vessel for unseaworthiness without orders from Washington.

A. I would say they had to have orders before they could detain them.

Mr. Durham:

Q. You spoke a moment ago about inspection of motor vessels carrying passengers or freight. What is meant by the word "passenger"?

A. A passenger is any person carried who hasn't connection with the ownership, operation or management of the vessel; although, in some respects, a passenger is supposed to be a person that pays a fare.

Q. That applies to a person who is riding on the boat who has not paid a fare?

A. Yes, sir, that would be the case.

Q. Are you familiar with a publication known as the Marine Digest?

A. Well, I am familiar with it, but I seldom read it because I have so many Government publications to read, it takes my time.

Q. Do you know if that is a standard and accepted publication in the industry?

A. I know it is very popular in the sea-faring fraternity.

Q. You have not read its issue of March 2nd?

A. No, I haven't. It is around the office, but I didn't get time.

Q. Is it a general and trustworthy publication so it may be accepted as a quotation made by the Secretary of Commerce?

A. I would say so.

[fol. 120] Mr. Durham: I would like to have page 2 of the issue of the Marine Digest for March 2nd, 1935, containing an interview or quotation from the Secretary of Commerce, Daniel C. Roper, his official transmission to the Chairman of the Senate Committee of Commerce, a statement with respect to the necessity for proposed legislation pertaining to the Bureau of Navigation and the steamboat inspection.

Mr. Robinson: If the Court please, I haven't seen this newspaper article. Such matters as I want to get in with the Secretary of Commerce I have prepared in the proper way. I don't know whether it is material or not, even.

Mr. Durham: Do you want to take a look at it?

Mr. Robinson: Yes.

Mr. Durham: I ask it be marked for identification.

(Page 2 of the Marine Digest for March 2, 1935, marked for identification as defendant's exhibit No. 2.)

Mr. Robinson: I suggest you call another witness. I can look at this at the same time. Just a minute, Mr. Dam, I want to ask you a few questions.

Recross-examination.

By Mr. Robinson:

Q. Mr. Dam, did I understand you that you were the head of the Customs inspection service in this district?

A. The Customs service is divided in divisions, and I have charge of the Marine division.

[fol. 121] Q. If a Customs inspector, on boarding one of these vessels for his usual and proper duties of inspecting as to whether these things were being carried out, should discover that she appeared to be leaking or unseaworthy, would it be his duty to report that and, if he did report it, what would you do about it?

A. He could report that the same as any other matter that comes to his attention. He would go to the Collector of Customs and he would refer it to me to see if we had jurisdiction, and I would report we didn't; but we could report it to the inspection division for hulls and waters.

(Witness excused.)

Captain Daniel Hutchins, being a witness called on behalf of defendants, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Mr. Robinson: The Court please, with reference to this page in the Marine Digest which has just been offered, I don't think the thing is material at all, and I don't want to admit its materiality, but counsel seems to want it in so badly that I won't formally object to it. I will argue there is nothing to it.

(Page 2 of the Marine Digest for March 2, 1935, admitted in evidence as defendant's exhibit 2.)

[fol. 122] Mr. Baker:

Q. Mr. Hutchins, you live in Seattle?

A. I do.

Q. You are in the employ of the Federal Government?

A. I am.

Q. In what capacity?

A. Acting local inspector of hulls, Bureau of Navigation, steamboat inspection service, Department of Commerce.

Q. How long have you occupied that position?

A. Two years, one month and 27 days.

Q. Well, will you explain your duties to the Court, Mr. Hutchins, as inspector of boilers, hulls?

A. Under title 3214 of the statutes, we are to determine the suitability of all vessels in regard to their safety, accommodations for the crew, to see they are suitably manned, to see officers and engineer officers are competent to perform the duties for which we license them, to see about the seaworthiness of vessels when they have a change of name, to certify able seamen, to certify and examine lifeboats, to ascertain the safety and accommodations and seaworthiness of vessels coming under our jurisdiction.

Q. Explain what your jurisdiction is relative to motor tugs.

A. Nothing. But when I say whenever a vessel is to have its name changed, we are required to examine the vessel and issue a so-called seaworthy certificate in order — the Customs may be properly informed of the identity of the vessel.

Q. Do you examine it for seaworthiness?

[fol. 123] A. We examine it to see it has the name and tonnage designated in the request and that it is afloat. We don't examine it for seaworthiness in the way of making an inspection of vessels coming under our jurisdiction.

Q. State whether or not you examine motor tugs' hulls for seaworthiness at the time they are first constructed.

A. No, sir.

Q. Do you have any jurisdiction—do you make any regulations?

A. No, sir.

Q. Do you ever exercise any authority over the number of men in the crew?

A. No, sir.

Q. Do you exercise any authority over the personnel, as to whether or not it is licensed, on a motor tug?

A. Do you mean do we determine the number of licensed men to man the vessel or whether we have authority over the men on the vessel holding a license?

Q. Is there any requirement on the part of your service that there be a licensed operator operating a motor tug?

A. Nothing.

Q. Do you know whether or not the Federal Government requires that there be any qualification as a condition precedent to operating a motor tug?

A. That I know nothing about.

Q. Now, will you—I was going to ask this question of Mr. Dam. Perhaps you can answer it for me. If not, I will ask him. Mr. Dam testified when a motor tug cleared for a foreign trip and after it left the waters of Puget [fol. 124] Sound as defined by the Port Angeles and Victoria area, a motor tug over 150 tons, it would be subject to inspection for certificate of seaworthiness by the American Bureau of Shipping. Now, as long as that particular tug, if it were over 150 tons gross, stayed within he areas of Port Angeles and Victoria, in that Sound area, would there be any requirement that that tug at any time be inspected for seaworthiness of hull?

A. Not that I know of. The inland waters of Puget Sound extend from New Dungeness and not from Port Angeles. Port Angeles is outside the pilot area of Puget Sound. So is Victoria.

Q. Will you kindly trace for us, as nearly as you can, where the dividing line runs?

A. I could only refer you to a pamphlet of pilot rules where you will see it defined in the blue book.

Q. Do you inspect tugs under forty feet?

A. All tow boats propelled by steam power. Regardless of hire or rent, towboats.

Q. State, if you know from your own knowledge, whether or not the Coast Guard service inspects motor tugs for seaworthiness of hull.

A. I know nothing about the Coast Guard.

Mr. Baker: I think that is all. You may examine.

[fol. 125] Cross-examination.

By Mr. Robinson:

Q. Captain, your service passes upon the sufficiency of life preservers and things of that kind?

A. Yes, sir.

Q. The Department of Commerce recognizes it?

A. With the exception of a ruling issued in our last circular relative to the motor boat act, which changes it from the supervision of the inspector we represent to any well qualified person, which is quite a difference, indeed. Who is to decide who a well qualified person is, I know not.

Q. You say in your testimony you don't have anything to do with motor tugs?

A. No, sir.

Q. And you are not prepared to testify about the regulations concerning motor tugs?

A. No, sir.

Q. And you don't wish to?

A. I don't know. I have all I can do to carry my own business in my head.

Q. I am just asking you that. Now, but you do have everything to say concerning steamboats?

A. Yes, sir. Subject, of course, to appeal.

Q. Yes. Now, Captain, if a man built a steam passenger vessel here to operate here, let us say between here and Shelton, he would come under your jurisdiction immediately she was commissioned?

A. Not if under sixty-five feet in length, except we would approve of the engine and boilers, giving them a letter of [fol. 126] approval, but make no survey of the hull.

Q. Make it sixty-five feet in length, then.

A. Then she is a motor boat. If propelled by steam, we have no jurisdiction; if by motor engine, we have.

Q. When does your jurisdiction begin with steam propelled boats?

A. Sixty-five feet and over.

Q. Assume this boat is sixty-five feet.

A. A fraction of an inch over sixty-five feet.

Q. Something over sixty-five feet.

A. Yes.

Q. Now, I presume that—when do you get jurisdiction over it?

A. Before they begin to build the boat, they draw up blue prints and specifications and we check them over; and when we object to anything, they take measures to correct it. That is the custom.

Q. Did you inspect her when she was being built?

A. Yes, in the course of construction we detail a man to check on the building to see if the building complies with the blue prints in our office.

Q. That would be if the boat were to operate between here and Shelton and not out of the waters of the State?
A. Yes.

Mr. Durham: We made objection to the testimony as to other boats than tow boats. Can it be understood that it runs to all the line of testimony?
The Court: Yes.
Mr. Robinson: My questioning is based on the theory [fol. 127] that the Act is so unconstitutional that it doesn't apply to Puget Sound; and we have to prove these things.
Mr. Durham: I just ask it apply to this line of testimony.

Mr. Robinson:

Q. You wouldn't want to know whether or not it was to go on under National waters; that is, whether or not it was going on waters of the United States?
A. Yes.
Q. Captain, you can help both of us if you will go along and tell us the things that would be under your jurisdiction on such a vessel.
A. A steel vessel over sixty-five feet in length carrying passengers. We first look over the prints and specifications and see everything is regular and up to the standards of our service. We o. k. it and, as construction goes along, detail a man to see the hull and machinery is installed according to the regulations of our service, to see the vessel is of a suitable character for the purpose for which it was built and navigated in safety and carry people safely; and that it carry accommodations for crew and that the crew is sufficient to navigate safely to all concerned. The principle purpose of our service is safety. We are not interested in the commercial end of it, although we are sympathetic. We know the vessels are not built for sport, but to make money, and we try to bring in the economic and safety in one way and protect our people and crews, and enlarge commerce.
Q. Such a vessel as surmised here would require a certificate of licensed officers?
[fol. 128] A. Yes.
Q. What would you require on that, just above the sixty-five feet?
A. Two second class pilots for a day; and I suppose two certified engineers; and we would require—if the vessel

is under 100 tons, she does not come under the able seaman's act, so would require at least three deck-hands.

Q. So you could specify the licensed officers and the crew she would be required to carry?

A. Yes.

Q. Would you have jurisdiction over the life-boats?

A. Yes, sir. She would have to carry life-boats, depending on the routes. If only three miles from shore, she would have to have ten percent of the people carried and, if further than that, thirty percent; if built to navigate the ocean, boatage and raftage for everybody carried; and if the deep shore, have to have boatage for everybody aboard.

Now, the character of those boats are standardized by our service and before life-boats are passed, they must be planned and blue print submitted to our service and approved, the construction of the boat looked after and the stability of the boats tested, and we give the o. k. to it, and the number and plan is attached and it is passed as a life-boat.

Q. The Board of supervising *of* inspectors covering bays, sounds and lakes, I presume, covers Puget Sound?

A. Yes, sir.

Q. Do you recognize that as the reprint of them?

[fol. 129] Yes, sir.

Q. These are giving the force of law to the statutes, are they not?

A. With this exception, they may be suspended or amended if sufficient reason is offered by committees of supervising inspectors. They have not the force of statutes because the statutes, as you know, cannot be changed by any inspector, but those rules and regulations are subject to amendment.

Q. The statute provides that they shall be made and must be obeyed and there are penalties for not obeying?

A. Yes, sir.

Q. You were speaking of life boats. I find in the regulations there is a page, over a page, for life-boats on every possible detail.

A. Yes, sir.

Q. And these regulations go into the same detail about life preservers?

A. Yes, sir.

Q. Even to the make of them they may use?

A. Yes, sir.

Q. And the same thing is the case about all sorts of fire prevention equipment used on vessels?

A. Yes.

Q. As a matter of fact——

A. Pardon me, not the same with fire prevention equipment. We list the standard ways recommended by the Bureau of Standards.

Q. Six or seven pages of lists, what they approve?

A. Yes, sir.

[fol. 130] Q. They must use only those kinds?

A. Yes.

Mr. Robinson: This, of course, is not a matter of evidence as much as it is a law book, but I ask to put it in because it is not always obtainable readily.

Mr. Baker: We have no objection. We stipulate, if you like, that is an authorized copy.

Mr. Robinson: I would like to retain it for the present. I will offer it later.

Mr. Robinson:

Q. Such a vessel as we described, you would go over annually and inspect all these matters?

A. One other thing, if she carried fifty people or more, we require a stability test that requires a man from Washington, D. C., to see she is stable and won't upset. We have authority to require a stability test on any vessel in our jurisdiction if we suspect her of being unstable.

Q. Captain, is there anything else you think of with refcrenee to a passenger vessel?

A. Well, just what do you mean? I can think of plenty of things.

Q. Now, authority you haven't mentioned.

A. If we have a complaint the vessel is unsafe, we go down personally, the inspector of boilers and inspector of hulls, and assistant inspectors, and give the vessel a general dusting, as we say; and if we find the claim is well founded, we give them notice they must remedy it and, until it is done, withdraw the certificate of inspection.

[fol. 131] Q. As to steam tugs, you have practically the same power?

A. We inspect steam tugs for the protection of the crew, to see the crew is safe and have suitable accommodations.

Q. And suitable fire prevention equipment and life preservers and that sort of thing?

A. Yes, even seeing if water tanks are in condition to have healthy drinking water.

Q. You have already told us you have no authority over motor tugs. Will you tell us what authority you have over any motor vessels?

A. The only authority we have over motor vessels under 15 gross tons, carrying passengers for hire, is this: they might carry an operator and the operators are licensed by our service and several of the operators have at times raised the question, due to the fact the operators are under the jurisdiction of our service, we could have those vessels inclined for their stability because the operator is responsible to our service. That is all the jurisdiction, you might say, we have over motor vessels under 15 gross tons.

All over 15 gross tons and less than 15 feet in length, controlled by the motor boat act to prevent collisions at sea and to determine the equipment on these vessels. The hull itself, so far as its seaworthiness was concerned, was not touched on in that act. That motor boat act requires us to license that there is no examination and no age limit. I have had boys 15 years of age come into our office and ask for a- operator's license and we have refused. The Bureau wrote and wanted to know under what authority [fol. 132] we had refused the age and we had to fall back on the old stand-by they had not reached the age of discretion. I have watched 250 people come off a motor boat in Tacoma one Sunday afternoon that is not inspected by our service except a letter of approval when we approve the engines and boilers. After that, we have nothing to do with it. It was not within our province to require a stability test or anything else to protect the people. What protection they had on that particular vessel, I know not.

On the other hand, if the vessel is towing logs we have to give it a regular inspection. That is the incongruity of the motor boat law. Diesel boats and pleasure boats, we have nothing to do with them, unless they are steam yachts. You can own a Diesel yacht 200 feet long and we have nothing to do with it. You could put a blind man on to pilot it and an imbecile to man it and go down the Sound and cut into a boat and drown people and we have nothing to do with it. I am answering your question. We have nothing

to do with fishing vessels. We have fishing vessels in Seattle, hundreds of tons and carry many people, but because they are oil vessels, we have no authority. If it is a steam vessel, we have. Motor vessels over 65 feet in length and over 15 gross tons must have the same fire and life saving equipment as all other passenger vessels, but beyond that, the authority of this service is limited. It is not as free as it is in steam vessels. It is only in the last few years we have been able to name the crew on these vessels. [fol. 133] For instance, one of the ferry boats was a steam vessel and it didn't have a pump large enough to throw a stream up to the upper deck. Up to that time we had no authority to remedy that. I think it is since 1927 we had that authority.

On another occasion, there was a ferry boat in Tacoma carrying 30 and 40 people, which had bottles of Flamo gas, and the book on the desk shows Flamo shall not be carried on vessels carrying passengers. Yet when we ordered it off, the operator was willing, but the manufacturer of the boat objected, notwithstanding he was told that if it exploded it would blow the vessel to smithereens. I am not sure we have the authority to do it but we have the cooperation of the operators. It is not a question of the law, but we put it up to the operators. We have no trouble with the operators of the ferries. They do everything we request them to do. That is the answer to your question.

Q. I am not sure I understand you correctly. Do I understand that, on vessels above 65 feet, driven by heavy oil engines, carrying passengers, you have substantially the same power with life saving equipment as with steamers?

A. Yes, sir, we have the same. The law says they shall have the same fire extinguishing equipment and life saving equipment that a steam vessel has.

Q. How about a freight vessel, not carrying passengers?

A. If over 15 tons, we inspect her. I have heard remarks they questioned our authority, but are glad to have the vessel inspected.

[fol. 134] Q. Do you issue a certificate of authority?

A. We do. We have never had the question from the Bureau, but the remarks of operators.

Q. I noticed the other day, looking over some of these reports, the number of motor vessels and steam vessels

showed one at Hoquiam 22 tons. What would that be, a passenger vessel?

A. 22 tons?

Q. I think so.

A. I wouldn't care to answer your question. I know nothing about conditions at Hoquiam. That is another district. There is another board of locals down there.

Q. Then the big thing is in tugs?

A. I don't know.

Q. I mean in the question of inspection.

A. Well, fishing vessels. We have fishing vessels carrying many hundred people. They fill up and there is nobody to inspect conditions there, inspect health, seaworthiness and fire, or anything, except underwriters with insurance policies.

Q. There is hundreds of those vessels?

A. I am speaking of the large ones, vessels to carry quite a number of people.

Q. Captain, do you have in mind how many vessels are inspected in the United States by the steamboat service?

A. I can't remember. You can get the information from the report of our Director to the Secretary of Commerce.

Q. I have it here. I thought perhaps you remembered it. Now, I have learned a considerable—I have been over this before but, if I understand you correctly, on motor vessels [fol. 135] of 65 feet and over 15 tons, whether carrying freight or passengers, your authority is substantially as broad as in any steamboat?

A. I wouldn't say 100 percent. That is a question yet to be definitely settled.

Q. But it is pretty largely so? It is over the boat and the life saving equipment and fire extinguishing, and so forth?

A. And the seaworthiness of hull, yes. Pleasure yachts and fishing vessels and tow boats, those are the three vessels propelled by heavy engines over which we have no jurisdiction.

Q. You know in a general way the Government has certain regulations and exercises supervision, but not through your department?

A. Yes.

Q. Through other channels?

A. Yes.

Q. I will not inquire as to that. Captain, in your position, you not only issue licenses, but it is also one of your duties to see that they are obeyed or, at any rate, if they are claimed to be.

A. We investigate accidents and see if the licensed man is responsible for the accident, and if we find him culpable after the investigation and trial, we take measures we think is prudent. Our decision is subject to repeal. We can suspend his license and also report him to the United States District Attorney if we feel it is criminal. It is subject to appeal to the supervising director, to the director and the Secretary of Commerce.

[fol. 136] Q. It has to be approved by the Secretary himself before the man's license can be taken away?

A. If he wishes to appeal.

Q. He is to have notice of a trial and appear by counsel?

A. Just the same as the United States Commissioner.

Q. To do that, you have to be familiar with the regulations concerning the steering and sailing rules and navigation rules?

A. I have means of posting myself. It is not necessary to keep it in mind all the time.

Q. I want to read you a little language from this Act we are talking about here, and I will say to counsel I am reading from rule 8, the second: "When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." Does that sound familiar to you?

A. It certainly does.

Q. That is one of the rules prescribed by the Federal Government, is it not?

A. Yes, sir.

Q. The exact language.

A. Are you reading from the pilot rules?

Q. The State law of Washington, 1907, with the idea of finding if it didn't take the rules right out of the Federal rule.

A. Mr. Robinson, I formerly memorized the rules of the road, but I don't remember them now; but the pilot rules have not the force of the rules of the road. Is that the pilot rules or the rules of the road? There is quite a difference.

[fol. 137] Q. This is the Washington law. It doesn't say what they are.

A. That word there, "steamboats" is not in our vernacular. We say vessels. This shows it is not an exact——

Q. Well, look at, say 2, 3, 4 and 5 there, under section 8. Those are paragraphs lifted right out of the Federal rules, aren't they, pilot rules?

A. I wouldn't care to answer that question directly. I would say that number 2 is probably. I don't affirm it. I say it probably is. But number 3 doesn't look so familiar. I think there is a little change in the language there.

Q. All right. I will read you this one. "Signals of distress shall be four distinct blasts of the whistle, and shall be recognized by the Master of any steamboat hearing the same, and he shall render such assistance as is in his power."

Mr. Baker: I don't see the materiality of these questions. It must be remembered that the jurisdiction of the State of Washington under this Act is not restricted to the waters navigable, but also apply to the waters land-locked, where they run steamboats; so the tender of these questions has no significance as to the issues involved herein.

Mr. Robinson: The Court please, at the argument on the demurrer, I insisted that one of the reasons for bringing the action, and one of the reasons I insisted the subsequent exceeding authority, they were misinterpreting this Act [fol. 138] to apply to Puget Sound when it was made to apply to Lake Chelan. It is my duty to show this act, from one end to the other, is unconstitutional as applied to Federal waters, and I have to show what the Federal law is in order to do it. That is the heart and front of my case.

The Court: I think you may make that showing. It occurs to me, however, that just simply copies of the Act would be sufficient.

Mr. Robinson: There is one or two cases. I am going to adopt that idea. One or two cases they are in conflict and I want to bring out.

Mr. Baker: That is a matter of interpretation for the Court, and not the contention of Mr. Robinson. I can't see questions asked of the witness of what the law is and the law in its shape and form as presented in the statutes of the State of Washington and the Federal statutes. The best evidence is the law itself, and the interpretation is to

be made by the Court. Mr. Robinson is attempting to make the witness assume judicial functions, thereby passing on whether or not the laws are the same.

Mr. Robinson: I am telling counsel I expect to abandon this, but Mr. Hutchins knows more about this than any of us; otherwise, we would have to dig it out.

Mr. Durham: The Captain said he was not familiar with *the* the pilot rules.

[fol. 139] Mr. Robinson: I guess he knows if four blasts of the whistle is right on Puget Sound or not.

The Court: He may proceed.

Mr. Robinson:

Q. That is the lawful signal?

A. That is one of them. The distress signals are the same as in the international rules of the road. I think it is article 31.

Q. There are one or two things I want to ask you here.

A. Blasts of the whistle or flags. Unusual noise of the fog whistle where the firing of a gun is a distress whistle.

Q. There is a section of the law reads: "Every ferry boat propelled by steam or electricity shall be provided with at least one substantial boat 15 feet or more in length, and properly supplied with oars, and kept tight and in good condition at all times, and so attached to such ferry boat that it may, in case of need, be launched into the water for immediate use. Every steamboat or vessel propelled by machinery and carrying passengers shall be provided, if of the measurement of 250 and less than 500 tons burden, with at least two substantial row-boats, with life-lines attached and properly supplied with oars, and kept tight and in good condition at all times, and so attached as to be capable of being launched into the water for immediate use in case of need; and if of the measurement of 500 tons or more, with at least one first class life-boat and one row-boat 25 feet long by 7 wide."

Now, of course, that is tonnage here where some of your [fol. 140] regulations go to length.

A. No, sir, our regulations go to size. We have life boats at certain capacity according to the tonnage of the vessel; that is,—(interrupted)

Q. Are you able to say whether a boat so outfitted would answer your rules, be sufficient?

A. No.
Q. It isn't sufficient?
A. No.
Q. It doesn't come anywhere near it?
A. No, nothing of the kind, in our rules.

Mr. Baker: I want to make an objection. It seems to me Mr. Robinson is going so far beyond the allegations of the Complaint to confuse it. Nowhere is there any allegations of the rules and regulations he is interrogating the witness on relative to the ferry boats and things of that sort. We are dealing with a situation involving tug boats and tug boats only. The law, if constitutional, must be held constitutional to tug boats only. The law is settled, he who is not affected by a law can not challenge its constitutionality only insofar as its constitutionality affects him. That is so well established, you can't change it. He has to prove the unconstitutionality insofar as affects tugboats and his plaintiffs who are all tugboat operators. We disclaim any intention to regulate any steamboats and we are interested only in motor boats, and I think that if we keep the [fol. 141] issue in this case clear only insofar as we restrict our testimony and our questions and our arguments confined to tugboats; otherwise, we would get into a mess nobody is going to understand.

Mr. Robinson: We might settle this now, then.

(Argument.)

The Court: I think, as I have indicated before, I am not going to restrict either party in this case to what I think the record should be, but I am going to allow you to develop the record so that you can present your theory, not only in this court at the conclusion of the case in argument, but will not be curtailed in any way by the appellate court.

Mr. Robinson: Very well. I think, perhaps, counsel don't understand my position, but I ought to tell them what it is. The suit is brought under the statute concerning prohibition. I say that these three subsequently are exceeding their authority, that the only authority they have got is not on inland waters, but the land-locked lakes, and they are assuming to extend it to the Federal waters, and I say in that, that, if I can show page after page of their law which can't constitutionally apply to Federal waters, I sustain my main point; and it is directly in point and directly

[fol. 142] material; however, I will do that by reading the law and not questioning Captain Hutchins much further.

Q. Mr. Hutchins, all tugs of any kind have to have life-preservers aboard, do they not?

A. I don't know what motor tugs have to have aboard.

Q. You know the motor boat law, don't you? At any rate, do you know there is a life-preserver description, "Two inches thick and twelve inches wide, with lines properly attached in such manner as to be convenient for use." Do you know of any such description of life-preserver under Federal law that would be permitted?

A. No, sir. We have balsa wood life-preservers.

Q. Just one or two questions more. You license engineers for those sort of motor vessels required down to first assistant, do you not?

A. I would defer that to Mr. Campbell.

Mr. Robinson: I think that is—just a minute.

Q. Captain, you don't assert any authority over any vessels of any kind that navigate land-locked waters, by which I mean waters from which there is not an outlet to the oceans?

A. Only lakes between two states; lakes between two states or between two countries. We inspect Waterton Lake between Canada and Washington, and Lake Tahoe between California and Nevada.

Q. If it is in one state and no outlet to the ocean?

A. We have no jurisdiction, only on the request to the Bureau, we would be requested to confer with builders of vessels for those waters.

[fol. 143] Q. In an advisory capacity?

A. Yes, sir.

Redirect examination.

By Mr. Durham:

Q. I think you said you had some jurisdiction over motor vessels over sixty-five feet in length, carrying passengers.

A. Yes, sir, on waters that are subject to inspection, not Lake Chelan.

Q. That is understood in all these questions. What do you mean by passenger?

A. Any person carried on the vessel not connected with the owner or the operation of the vessel, a general passenger.

Q. Would that include stevedores or longshoremen carried in connection of the company's business?

A. That would depend on the arrangements made for the carrying of those people.

Q. If carried for hire.

A. We don't allow them to carry stevedores unless it is in the certificate, or issue an amendment.

Q. Do you inspect any tugboats in your territory on the ground they carry passengers?

A. We inspect a few tugboats and insert in the certificate a clause to carry some stevedores when desired. We are very zealous about putting that out. As far as I know, only one vessel carries that now.

Q. What vessel is that, do you recall?

[fol. 144] A. I can't remember.

Q. Do you remember who it is owned by?

A. No, I don't remember.

Q. Aside from this one vessel, you don't inspect any vessel?

A. I am speaking of steam tugs. We don't inspect any motor tugs.

Q. Was this vessel you said you inspected because it had passengers a steam tug?

A. Occasionally when a fleet comes to Seattle, vessels are engaged in carrying sight-seers from the shore to the ships and when the occasion arises, in the interests of public safety, we assume jurisdiction over these vessels, see that they have sufficient life-preservers and fire equipment and, in general, safe for the carrying of people for hire, but it is questionable if we have that authority directly under the law. It is something we assume for the public emergency.

Q. You don't claim legal authority to do it?

A. We have, but how much I am not prepared to say. In our business, in administering the law, if we have any doubts as to our position, we confer with our superiors.

Q. The towboats, motor towboats on Puget Sound and in the waters of the state of Washington in your jurisdiction are none of them inspected by you now, are they?

A. No.

Q. Now, you spoke of an operator's license being required for a certain class of vessels. An operator's license you issue without examination. What class of vessels, for what class of vessels is this operator's license required?

[fol. 145] A. Operator's licenses are required by the men in charge of vessels carrying passengers or freight for hire over 15 gross tons and over 65 feet in length, and vessels under 15 gross tons carrying passengers for hire.

Q. That is passengers for hire?

A. Yes. That for hire is superfluous.

Q. There is no operator's license required for the operator of a motor driven tug boat?

A. Not that I know of.

Q. Certainly none that this provision with relation to not requiring an examination refers to?

A. Not that I know of. An operator doesn't even have to have a color test. That is up to the company.

Q. The operator's license which the law says there shall be no examination for, that operator's license is one that is issued by you and applies to that class of vessels you have mentioned?

A. You mean under 65 feet and over 15 gross tons? Yes, sir.

Q. Does that section, there shall be no examination for an operator's license, has no relation whatever to motor driven tugboats?

A. Not that I know of.

Mr. Robinson: I will concede that.

Mr. Durham:

Q. As I understand, the exhibit that you have identified and which Mr. Robinson has, I don't believe it has been numbered yet.

Mr. Robinson: I shall have it numbered.

(General rules and regulations admitted in evidence as plaintiff's exhibit 3.)

[fol. 146] Mr. Robinson: In order to complete the record

Mr. Durham: You are putting these witnesses on for direct. Plaintiff's 1 is your exhibit and 3 is your exhibit. I would like the record to so show.

Mr. Robinson: To finish it up, I ask the Captain to say if he recognizes that as form 804 of pilot rules for inland waters.

I ask to put this in also.

(Pilot rules for certain inland waters admitted in evidence as plaintiff's exhibit 4.)

Mr. Baker: There would be some considerable question. I don't know whose witness he is.

Mr. Durham: Counsel said he would be considered on these witnesses as direct on both parties.

Mr. Robinson: I am willing to take him any time.

Mr. Durham:

Q. You are very strict in regard to the vessels under your jurisdiction with regard to their operation on Puget Sound?

A. We are conscientious to see the law is observed as we see it.

Q. On Puget Sound are many traffic lanes of ferry boats and passenger boats going in all directions, are there not?

A. I will say yes, inferring, of course, what your question means to my point of view. Traffic lane on the water is hardly traffic routes.

Q. Well, say traffic routes criss-cross in all directions on the Sound.

A. Yes, sir.

[fol. 147] Q. Thousands and thousands of people travel across the Sound every day?

A. I would think so, from examination of our records.

Q. And many, many boats go in every direction?

A. Yes.

Q. Fogs are very prevalent on the Sound in certain seasons of the year?

A. Yes.

Q. There are a great many tide rips and menaces to navigation on the Sound?

A. Well, I would hardly couple the two together. There are tide rips and there are menaces to navigation.

Q. It takes quite a skillful man to navigate a ship on Puget Sound?

A. I would say an experienced man.

Q. One who knows the directions and the rate of the tides and the contours of the numerous harbors and bays there are?

A. He should have a certain amount of knowledge of that kind. I wouldn't say he must know those things.

Q. He must know those things if he is to navigate a vessel successfully in the fog?

A. Safely.

Q. Now, you have no jurisdiction whatever, I think you said, of pleasure, fishing and towboats, motor driven?

A. Propelled by heavy oil, gasoline or such conditions.

Q. This exhibit I have identified, I think you have made out, and I would like to make it clear that it differs from a statute of these statutes that you have authority to alter when occasion arises.

[fol. 148] A. It is questionable if a man is operating an uninspected vessel under the authority of the license. If Tom Smith puts John Brown to work on his uninspected ship because he holds a license, it is a question whether we have authority over that individual in case he made a mistake, in case he was culpable in any way. If a man went out on an inspected ship and was given the position because he had a license, and drowned a number of people because he had, I would say we should step in.

Q. Would you have authority to drop his license?

A. It is questionable.

Mr. Baker:

Q. In order to get this situation clear, I want to put this one question to you. Regardless of tonnage of a motor tug, whether it be over 100 tons and over 65 feet, or under a hundred tons and over 65 feet, you have no authority to inspect that tug for seaworthiness of hull, is that right?

A. Unless he wanted to change her name.

Q. Then your inspection to be for what?

A. To identify the vessel, number and tonnage, and see she is afloat.

Mr. Baker: That is all. You may examine, Mr. Robinson.

[fol. 149] Recross-examination.

By Mr. Robinson:

Q. A little while ago you raised the question of licensed men working on uninspected vessels. That happens quite frequently, doesn't it?

A. I don't know. I wouldn't care to answer the question on hearsay.

Q. As far as you know, that may happen?

A. It may; it is possible.

Q. All vessels are, report accidents to the Customs, don't they?

A. All vessels report accidents to the Customs within a period of five days. I understand there is blanks furnished for that purpose.

Q. All licensed operators must report accidents to you?

A. Yes, and to the Customs office.

Q. You are posted to what accidents occur at sea in your locality?

A. I wouldn't care to define my own capability. That is for you to say, or somebody else.

Q. You hear of any serious marine accidents that happen on Puget Sound, don't you? I mean resulting in loss of life?

A. Yes, we hear of it, but we don't hear of all of the accidents.

Q. I mean serious accidents resulting in loss of life.

A. We are supposed to.

Q. You do, don't you?

A. I think so.

Q. You have been some two years in your own position?

[fol. 150] A. Yes, sir.

Q. What before that?

A. In a subordinate position to the one I occupy now. I would like to put in the—for fifteen years. I would like to put in the record I have received the same remuneration for the last two years, one month and seventeen days as I received before that.

Q. Captain, can you recall any serious loss of life in a tugboat accident in Puget Sound recently, within four or five years?

A. I don't think my memory is clear enough to answer your question, Mr. Robinson.

Q. You recall the loss of the Warren, don't you?

A. I remember hearing something about it.

Q. She was lost up around Protection Island somewhere. She was a motor tug, wasn't she?

A. I believe she was.

Q. Do you remember the loss of the Bahada?

A. I remember about a vessel named Bahada.

Q. She was an inspected tug, wasn't she, a steam tug?

A. I couldn't answer your question definitely, but I think she was. You see, Mr. Robinson, I have to carry so many important things in my mind that these things of the past, I depend on going to the source of the information to refresh my mind.

Q. I will ask you this, then I can prove it by others. Would you say there was any substantial loss of life in tugs in Puget Sound the last five or fifteen years?

A. What do you mean, substantial?

Q. More than four or five men?

[fol. 151] A. I don't know.

Mr. Baker: What is your standard of loss of life?

Mr. Robinson:

Q. Can you tell me of any loss of life other than the Bahada and the Warren in the last five years?

A. I couldn't answer the question without thinking fifteen minutes or so. So far as I can remember——

Q. You see what I am after?

A. Yes.

Q. Counsel was trying to enforce on you the great dangers of navigating, and I want to know if anyone was killed.

(Witness excused.)

(Whereupon a recess was taken for fifteen minutes. Upon reconvening, the following proceedings were had:)

[fol. 152] Mr. William M. Campbell, being a witness called on behalf of defendants, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Your name?

A. William M. Campbell.

Q. Your position with the United States Government?

A. Acting local inspector of boilers.

Q. For how long have you been the inspector of boilers?

A. Inspector of boilers? I have been inspector of boilers for almost eighteen years, but my present position is two years the first of this August.

Q. Will you explain your duties to the Court, please?

A. My position is to supervise the manner the reports of the inspectors of boilers, whether or not there is any defect and, if there should be defects, the approval of their repairs; also the shafting of the engines. In fact, any defect regarding the mechanical end of the ship comes under my supervision.

Q. What vessels do you inspect, Captain, or do your men inspect?

A. The steam vessels we inspect; and also a limited amount of motor vessels. Very limited on motor vessels.

Q. Which motor vessels do you inspect?

A. Motor vessels over 15 tons.

Q. Do you inspect tugboats?

A. Motor towboats?

Q. Yes, motor towboats.

A. No.

[fol. 153] Q. Of any sort and character?

A. None whatever.

Q. Does it make any difference whatever as to the size of the tonnage?

A. Absolutely not.

Q. State from your own knowledge whether any branch of the United States Government inspects the machinery of motor towboats for the purpose of ascertaining the fitness of any machinery used in propelling such motor towboats.

A. I can't speak as to the regulations of any other branch of the service, of the Bureau.

Q. From your own knowledge, are you able to tell whether or not tanks, other equipment, machinery used in the tug-

boats, are of such dangerous nature as should require inspection?

A. Vessels over 15 tons we would inspect the boiler if there is any on it, and also the pressure vessel.

Q. Let me restrict the question to tugboats.

A. I understand that.

Q. That is, motor tugboats, not steam?

A. Exactly.

Q. Your answer was what?

A. Boilers of motor vessels over 15 tons that have a boiler, and also pressure vessels; that would be compressed air tanks.

Q. I don't get this exactly clear. As I understood you to say, Mr. Campbell, that under those circumstances, do you inspect motor tugboats or their machinery?

A. Certainly not.

[fol. 154] Q. My question was, from your general knowledge of machinery used in operating boats, whether or not you think there is any necessity from the standpoint of whether or not machinery is potentially dangerous, for the inspection of machinery used—or let me withdraw that question, first, and get to it this way:

Are you familiar with the type of machinery that is used in the propelling of motor tugboats?

A. Yes.

Q. All right. Now, will you state for the Court whether, in your opinion, the type of equipment and machinery contrivances used in the propelling of these boats is such that there is any necessity for inspection?

A. I can only give my personal opinion, Your Honor. We have no regulations on that.

Mr. Robinson: If the Court please, not at all inferring any feeling that Mr. Campbell is not qualified, which you assume he is, I object to the matter as immaterial. The question here is a question of what has been done, not what ought to be done. What ought to be done is a question that is decided by Congress and not by this gentleman and the opinion is entirely irrelevant.

The Court: I am inclined to agree with the objection. It seems to me the question being tested here is whether a law that has been passed is constitutional and the question that you have asked is one going to the wisdom of the law, in which the Court isn't concerned.

[fol. 155] Mr. Baker: I understand at the present time you make no contention that the statute of 1907 is questioned here, passed by the Legislature of that time, is not objectionable by reason that it is arbitrary abuse of the police power and isn't founded on any just and due exercise of the police power on that ground.

Mr. Robinson: No, and I am even willing to say I think you have a right to show the necessity of this thing if you desire to do so, but I didn't think this gentleman's position with the Government was such his opinion would be of much— I withdraw the objection.

Mr. Baker: It is all right. All I want to understand is that, regardless of its constitutionality on other grounds, you don't contest it on the ground it is not a fair and due exercise of the police power.

Mr. Robinson: No.

Mr. Baker: And for the purpose of making our position clear to the Court, we do not believe—this explanation as I am now giving it is suggested to me, the necessity of it is suggested to me by reason of what the Court just said as to what the Court considers the purpose of this proceeding.

It is our contention that the constitutionality of the law is not involved because, in any event, this statute applies to land-locked waters. Our conception is this, that the [fol. 156] law operates in two phases. As to steamboats in land-locked waters, all these provisions that Mr. Robinson referred to, which, to him conflict with the Federal Government provisions, they apply only to those particular jurisdictions exclusively within the jurisdiction of the State, the land-locked waters; but as to the other provisions of inspection which do not conflict with the provisions of the Federal Government in her proper exercise of the police power, upon that scope of the field that the Federal Government does not cover.

The constitutionality of the statute is not involved. It is a question of whether or not the statute, in certain instances, conflicts with the Federal statute in those instances. It is suggested that the Court could hold it applied only to the jurisdiction of the waters in the state.

The Court: I understand that.

Mr. Durham: It is our opinion, also, that the law is unquestionably constitutional; that it is in the power of the

state to legislate on landlocked waters; that, as to any conflict with the Federal law, if any, on Puget Sound and waters of that character, the law could not be invalid but, under the interpretation of our own Supreme Court in State versus Ames, 47 Wash, 328, the law would be only inoperative to that extent.

[fol. 157] They used the words there "inoperative to that extent". That is the position on behalf of the client I represent.

Mr. Baker: No further questions.

Mr. Robinson: Of course, those questions could be answered only by those books piled on the desk there.

Cross-examination.

By Mr. Robinson:

Q. I think you should tell me a little more accurately about the licenses issued to motor vessels. What grades of license are issued?

A. We issue one license on tonnage and on those limited to one engineer. And one, two and three engineers. And also have a chief engineer of 300 ton and first assistant engineer of 150 ton. The local inspectors are authorized to designate on the license the tonnage they consider the man qualified to fill.

Q. What is the lowest tonnage covered there? Let me put it another way; the lowest license would go up to what tonnage?

A. The lowest would probably be 10 tons.

Q. Well, suppose a vessel carrying passengers or freight of a couple of hundred tons, and they are a motor driven vessel, what license men would she have, a vessel over 200 tons?

A. A chief engineer of 200 tons would cover the vessel.

Q. She would require no other license in the engineering department?

[fol. 158] A. Chief engineer of 200 tons would cover a 200 ton vessel.

Mr. Baker: Are you referring to motor vessels?

A. 10 ton. I am referring to steam vessels. I said 10 ton, that refers to a steam vessel.

Mr. Robinson:

Q. I understand you don't license for tugs, but the biggest tug we have got here is about 400 tons. I know you don't license for that, but suppose you had a boat of the motor kind you do license, what license then would you require in the license department?

A. Do you mean the number of——(interrupted)

Q. Yes.

A. The chief engineer, and it would depend on the run. The chief engineer and one assistant engineer, and two oilers if it was on Puget Sound, providing the vessel was running over thirteen hours in any one day. If it should run less than thirteen hours a day, one engineer and one oiler is all that is necessary.

Q. What is the requirement of the chief engineer of a vessel like that?

A. It would require three years experience in the engine department of a motor vessel. That would be an oil vessel. He would require three years as an oiler in the engine department for a license as chief engineer of 400 gross tons.

Q. What would a third assistant engineer have to have in experience, in Puget Sound?

A. That would be three years.

Q. On some kind of a motor driven vessel?

A. Yes, sir.

[fol. 159] Q. That is, if he was on some tug, motor driven, that would count as time for his experience?

A. That would count.

Redirect examination.

By Mr. Baker:

Q. You were talking only of licensed engineering personnel?

A. That is all.

Q. And all remarks you made had no bearing upon tugboats, motor driven tugboats?

A. Just repeat the question.

Q. The testimony you just offered in response to Mr. Robinson's questions had no bearing upon motor driven tugboats?

A. They are not required to have a license from our department.

(Witness excused.)

[fol. 160] Mr. Baker: At this time I would like to offer in evidence, by stipulation with Mr. Robinson, some questions that were propounded to the Coast Guard and an answer from the officer of the Coast Guard, R. W. Dempwolf, Captain of the U. S. Coast Guard in Seattle. The officers couldn't come down here because I was informed too late to secure the authorization from Washington that they would have to have, so, by agreement, it has been stipulated that this can go in as evidence.

Mr. Robinson: I have agreed to waive the rule of evidence and permit you to put it in.

(Letter admitted in evidence as defendant's exhibit 5.)

Mr. Robinson: May I resume my investigations?

Mr. Baker: Yes, pardon me.

FRANK HUBBLE, being a witness called on behalf of plaintiff, after having been first duly sworn, testified as follows:

Mr. Robinson: Mr. Baker, I understood you to say you wanted Mr. Hubble to remain here. You can have him now.

Mr. Baker: I wanted to ask one question.

[fol. 161] Cross-examination.

By Mr. Baker:

Q. I have a letter here, Mr. Hubble, that is addressed to the United States local inspector of boilers, signed by George Graw, purporting to come from the Allman-Hubble Tugboat Company. It is a copy of the letter. I hand you this letter and ask you whether or not the original of that was sent to the United States inspector of boilers, I think, steamboat inspection service.

A. I suppose it is, yes; who copied it?

Q. I don't know. This was given to us by the office.

A. It isn't on our stationery.

Q. This letter says as follows: "Please be advised that our tug 'Ranger' has been made a Diesel tug, so we are not up for inspection." Addressed to the United States Inspector of Boilers, Boat Inspection Service, Seattle, Wash-

ington. At the time, this was written by your authority, was it?

A. Well, it is a long time ago. I suppose it was.

Q. Dated August 5th, 1926.

A. We have changed the steam to Diesel. That is the only reason I can see for it.

Q. Was the purpose of changing the type of motivation power at that time for the purpose of escaping from the Federal inspection service?

A. No.

Q. But you did know, however, if you did change the type of engine or machinery used for propelling the boat, you—that is, if you put in a motor instead of steam, you would be no longer subject to the steamboat inspection service?

[fol. 162] A. I would know that, yes, but the reason we made the change was the boiler went bad and we had to make a change, and we changed to Diesel.

Q. I am getting at, was it your impression that motor tugboats were not subject to inspection by the United States officials?

A. The change was made, as I said, because the boiler went bum and I think she wasn't subject to inspection.

Mr. Durham:

Q. As soon as you changed those to a Diesel tug, did you reduce the personnel on the boat?

A. No, we had the same amount of men on the Diesel rig we had on the steam. That is, the same amount that the Federal inspectors called for. If she called for three men, we still had three men on.

Mr. Baker: We will offer this in evidence.

Mr. Robinson: Is there any use putting it in, in view he admitted the change was made?

Mr. Baker: No, it is read in, anyway.

Redirect examination.

Br. Mr. Robinson:

Q. Mr. Hubble, you are of the Allman-Hubble Tugboat Company?

A. Yes, sir.

Q. That is a Washington corporation?

A. Yes, sir.

Q. Are you an officer?

A. Yes, sir.

Q. What officer?

[fol. 163] A. President.

Q. Now, you have a steam tug over 40 feet long, the Champion?

A. We have two or three.

Q. And you operate the Tyee?

A. Yes.

Q. And she has a tonnage—is over 65 feet?

A. Yes, sir.

Q. And the Ranger, Vance and Lucien, over 65 feet, four over and one under?

A. I think that is right.

Q. Those are run as Dr. Hutchins, Captain Hutchins, expresses it, by heavy oil engines?

A. Yes, sir.

Q. Where is your business on the Harbor?

A. Hoquiam.

Q. What kind of business do you handle?

A. Anything we can get ahold of.

Q. Are you called to haul any vessels that come in for lumber?

A. Yes, sir.

Q. Do you do anything of that nature in Grays Harbor?

A. Take them through the bridges and around the bends.

Q. Do the conditions there require the big off-shore vessels have the assistance of tugs in working around Grays Harbor?

A. They don't hire a tug unless they have to have them.

Q. Do they hire them right along?

A. Yes, sir.

Q. Would you be able to say what proportion of your [fol. 164] work consisted in handling vessels of that kind?

A. No. It is a small portion of our business. We had to assist one of them over the bar last month.

Q. Do you do any interstate, do you tow any down to Oregon?

A. Yes.

Q. How much?

A. Well, the Tye, up to the last couple of years was, about 90 percent of her business was down there. The last couple of years, I would say 25 percent.

Q. The last two or three years no towboat man tows much any place. What I want is, under normal conditions did you do considerable interstate business?

A. Yes, sir.

Q. Open to do interstate business now?

A. Yes, sir.

Q. What part of Oregon?

A. To about thirty miles south of the Columbia River.

Q. What other tugboat companies do you have in Grays Harbor?

A. The R. J. Ultican Tugboat Company.

Q. They are represented in this suit?

A. Yes, sir.

Q. Do Ulticans handle any of these interstate or offshore vessels?

A. Yes, sir.

Q. How long have you been in the tugboat business?

A. I have been an operator ever since 1909.

Q. Since 1909. That is far enough. That is two years after this ancient law we are considering was passed. Now, [fol. 165] you keep pretty well posted on what is happening in towing circles?

A. I try to.

Q. Have there been any severe tugboat accidents lately, resulting in loss of life? If so, what are they?

A. Not for quite a while.

Q. For how long?

Mr. Baker: If the Court please, it doesn't make any difference. Mr. Robinson has admitted we aren't concerned with the necessity of this regulation. He admitted, under the police power, the legislature has power to pass the law, so we are getting into things not necessary. The record is cumbersome enough now.

Mr. Robinson: The counsel comes in this morning and tries to make out the Winona was defective because it wasn't inspected, and the other counsel brings attention to the great lines of commerce. I should have some comeback.

The Court: I think you may proceed with it.

Mr. Robinson:

Q. Well, have you heard of any tugboat accident resulting in any particular loss of life since this Warren accident up here?

A. You mean here, or—we had an accident in '25.
Q. What was that?
A. A steam tug on the bar.
Q. A steam tug on the bar. An inspected tug?
A. Yes, sir.
Q. Men lost?
[fol. 166] A. Yes.
Q. Did you have any more around Grays Harbor?
A. No.
Q. How many men were lost in that steam tug?
A. Three.
Q. Did you have any more around Grays Harbor?
A. No.
Q. Do you know anything about this accident of the Warren?
A. Only what I have heard. I knew the operators.
Q. That was Ultican's boat, wasn't it? Is he there now?
A. His boy is here.

Mr. Robinson: Do you object to this man testifying, or do you want me to call Mr. Ultican?

Mr. Baker: It doesn't matter. I don't think it is competent.

Mr. Robinson: If you are objecting on the ground of hearsay, I will call Mr——

Q. Where was that boat Warren lost?
A. I couldn't say, I am sure.
Q. Do you know how many men lost their life in that accident?
A. If I remember right, it was three. I couldn't say.
Q. Other than the accident you have mentioned, do you, as to a towboat man, know of any loss of life in a towboat accident in the state of Washington in the last four or five years?
A. No, sir.
Q. And you only know those by hearsay?
A. Yes, sir.

[fol. 167] Mr. Durham:

Q. Do you do most of your towing around Grays Harbor?
A. Yes, sir.
Q. It has a shallow bar?
A. Not necessarily. It is a pretty good bar now, we think.

Q. A man has to be pretty familiar with the bar to navigate the bar?

A. Has to be to navigate anywhere.

Q. Some shoals there?

A. Yes.

Q. Lots of fogs there?

A. Not so much; not more than other places.

Q. Considerable of your towing is up the river?

A. We are towing from Willapa Harbor, and she isn't too straight. Nature didn't straighten her out too much.

Q. Channels the operator of a boat must know to operate it successfully?

A. Yes.

Q. Quite a few local conditions relating to navigation and safety that are peculiar to safety?

A. You have the condition anywhere.

Q. There are conditions there peculiar to Grays Harbor?

A. Yes.

Mr. Durham: That is all.

Mr. Baker: No questions.

(Witness excused.)

[fol. 168] R. J. Ultican, Jr., being a witness called on behalf of plaintiffs, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Your name, please?

A. R. J. Ultican, Jr.

Q. You are connected with the towboat company that is one of the plaintiffs in this case?

A. Yes, sir.

Q. You remember that your company lost the Warren in 1928?

A. Yes, sir.

Q. Do you remember how many men were lost in that accident?

A. Five.

Q. The Warren was a motor tug, was she not?

A. Yes.

Q. That accident occurred around Protection Island?
A. As I understand, the accident occurred off Port Townsend.

(Witness excused.)

[fol. 169] FRANK GILKEY, being a witness called on behalf of plaintiffs, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Mr. Gilkey, will you give your initials, please?
A. Frank.
Q. You live at Anacortes, do you not?
A. Yes, sir.
Q. You have been in the towboat business for a good many years in one way and another?
A. Yes, about eleven years.
Q. Operating all over Puget Sound?
A. Yes, sir.
Q. And some in the Dominion of Canada?
A. Yes, sir, considerable.
Q. You know what is going on in the navigation circles, generally?
A. Yes, sir.
Q. Do you know whether or not Canadian tugs go from Canada to American waters?
A. Yes, sir.
Q. Has there been any considerable of that business?
A. Considerable. In the past few years it has been spasmodic. Sometimes they do most of the towing and other times the American boats do nearly all the towing.
Q. When you say that, you are referring to log towing?
A. Principally.
Q. There are times when there are considerable Canadian tugs towing in these waters?
[fol. 170] A. Yes, sir.
Q. You heard the testimony of the loss of the Warren; you had heard of that?
A. Yes, sir.

Q. Do you know of any other tugboat accidents resulting in serious loss of lives and injury in the last five years?

A. Yes, we lost a boat, the Bahada, a steam vessel, with nine men aboard, and we had a total loss.

Q. When was that?

A. That was in November, 1926.

Q. She was a fully inspected steam vessel?

A. Yes, sir.

Q. Then, there was the loss of the Warren, a motor vessel?

A. Yes, sir.

Q. Do you know of any other tugboat accidents resulting in loss of life in the last five years?

A. No, I don't know of any loss of life. There has been other accidents.

Q. To be fair in the latter, it is possible there might be an individual or two lost here and there that you don't know of? There has been no major disaster?

A. No, not by a boat going down. There have been instances of a man killed by exposure or caught by a slip or something like that, but not from a boat sinking.

Q. Did you ever know the T. W. Lake?

A. Yes, sir.

Q. What was she?

A. The T. W. Lake was a vessel that was, I don't know, she was built previous to 1892. We have pictures taken of her at that time.

[fol. 171] Q. What kind of a vessel was that?

A. At the time she had the accident, she was carrying lime from Roche Harbor to Seattle, I believe.

Q. Do you know what year that was?

A. 1925, I believe, or '26.

Q. How many men were lost in that accident?

A. I don't remember exactly, twelve or fourteen men. I am not positive of the number of men.

Q. That is the largest marine disaster on local waters, for a number of years, isn't it?

A. Yes, sir.

Q. She was a steamboat under steam inspection?

A. I believe she was.

Q. Do you ever have to use tugs in Anacortes to handle the big boats out on the wharf?

A. Not often. Our docks are ample and the tides so favorable they don't need the assistance of tugs in that. The only occasion they use tugs there is where there might be a cross wind of the channel where they can't land or can't get away from the dock on account of the wind, and they use a tug, but that is very rarely.

Mr. Robinson: That is all, I think.
Mr. Baker: No questions.

[fol. 172] Cross-examination.

By Mr. Durham:

Q. In your testimony in regard to the accidents, you don't pretend to know what accidents occurred on the Sound with tugs, do you?

A. I just know from information.

Q. Just those you happen to have heard about, you are telling about?

A. Yes, we hear about most of these accidents that occur, being in that particular line of work.

Q. You excluded from that all accidents where life has not been lost? You have omitted all accidents which didn't happen to result in the loss of life, didn't you, where the people got ashore?

A. There have been accidents, I think, where the crew—I don't know as there has been any vssels have gone down. I don't know, there may have been one or two cases where the boat was abandoned. I couldn't say.

Q. You omitted accidents by an explosion or something like that, where the boat didn't sink?

A. Well, I don't know. There have been other little accidents. They are general. They occur quite often in general conditions of the Sound. There is accidents at different times.

Q. You haven't testified of the collisions between towboats and other vessels. You have heard of those?

A. No.

Mr. Robinson: The questions were confined to major loss of life on the face.

[fol. 173] Mr. Durham:

Q. Did you ever hear of the case of the boy by the name of Meagher that was killed on the Bermuda down near Edmonds?

A. I don't know, I might have. Was that on Wagner's?

Q. Wagner's Tugboat Company. The case went to the Supreme Court.

A. I am not familiar with the case. I am not familiar with it.

Q. Now, you don't contend that an inexperienced operator of a boat can run it as safely as a man of experience?

A. We don't have any inexperienced men on our boats.

Q. You put them on voluntarily; you, yourself, check the experience?

A. We satisfy ourselves the men are capable of handling the boats before we put them on.

Q. You are not compelled to by the Government?

A. Not on motor boats.

(Witness excused.)

[fol. 174] R. F. Johnson, being a witness called on behalf of plaintiffs, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Give your initials, Mr. Johnson.

A. R. F. Johnson.

Q. The Johnson Towboat Company is located in Port Angeles?

A. Yes, sir.

Q. I have forgotten what your type of vessel is.

A. We have three Diesel vessels.

Q. How big?

A. The largest one is just under 65 feet.

Q. So they are all three motor boats?

A. Yes, sir.

Q. What sort of towing do you do?

A. General towing, local and foreign.

Q. Where do you tow foreign and how much?

A. We tow considerable from British Columbia with the Nainamo and Lady Smith.

Q. Which boats do you use on those, all three of them?

A. Yes, sir.

Q. All three are capable of doing that across the Straits of Juan de Fuca?

A. Yes, sir.

Q. Could you give us an estimation of what portion of your time is engaged in that foreign work?

A. It depends a lot on the times. I imagine about six trips a year these times. Of course, more——

[fol. 175] Q. Is there anything about the situation up there at Port Angeles that requires tugs to assist large vessels around the Harbor, or anything?

A. Occasionally.

Mr. Robinson: I think that is all.

Cross-examination.

By Mr. Durham:

Q. When were you last called upon to assist a large vessel around Port Angeles Harbor?

A. I couldn't say for sure. I would say about six months ago. I wouldn't say for sure.

Q. It is a very rare occurrence?

A. Yes, it is. It depends on the wind.

Q. You say you would say about six trips across the Straits a year?

A. About that, I would say.

Q. Out of a total of several hundred trips?

A. Yes.

Q. About how many trips do you take a year, your company?

A. Do you mean locally?

Q. What is the total number of towing trips in a year?

A. I couldn't say that. I would have to look it up.

Q. More than an average of one a day?

A. No, I wouldn't say it was more than an average of one a day.

Q. About one a day, on an average, taking all your boats?

A. A trip, you know, means all the way from one day to two weeks. It depends on the job.

[fol. 176] Q. I am taking all the trips, long and short.

A. I couldn't say the number of trips.

Q. Would it run one a day, would you say, on an average?

A. No.

Q. Three hundred a year?

A. No, I wish we did.

Q. How many a year, then, or about what percentage would this six be of your total business, total number of trips?

A. I am not prepared to answer that.

Mr. Baker:

Q. A small percentage or large percentage?

A. It is a small percentage of our business now.

Redirect examination.

By Mr. Robinson:

Q. Wasn't there a time some years ago you used to do a lot of gravel towing across the line?

A. Yes, sir, and also lumber north of Lummi Bay.

Q. That is not Canadian waters?

A. Yes, sir. That is on the northern end of Tuxada Island.

Q. At that time, you were almost exclusively engaged in that?

A. I would say 50 percent of our business was with British Columbia.

Q. How long ago was that?

A. I couldn't say exactly.

[fol. 177] Q. Roughly.

A. Six years ago, at least.

Q. Before the depression?

A. Yes.

Mr. Robinson: That is all.

(Witness excused.)

WEDELL FOSS, being a witness recalled on behalf of plaintiffs having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Mr. Foss, you were sworn this morning. I don't remember, Mr. Foss, if we discussed the matter of Canadian tugs. Do Canadian tugs tow down here?
A. Yes, sir.
Q. What sort of tugs?
A. Logs and coal, and once in a while lumber and ships.
Q. Is there much of that?
A. At times, considerable.
Q. They tow back from here?
A. Yes, sir.
Q. A Canadian tug comes down here and gets a load and tows to Canada?
A. Yes, sir.
Q. So they can compete with you in that field?
[fol. 178] A. Yes, sir.
Q. Do they?
A. They do.
Q. In Tacoma, is there any cases where your tugs are used in assisting the off-shore vessels?
A. One or two tugs are engaged in that continuously.
Q. What sort of work do you mean?
A. A ship comes in from Europe and, due to the Harbor there, the dock being in shallow waters, the vessels need tugs to assist them in and out again more in Tacoma than other places.
Q. You say there is quite a bit of that work in Tacoma?
A. Yes, sir.

Cross-examination.

By Mr. Durham:

Q. As a matter of fact, American boats aren't towing into Canada because they are stopped at the point of entry and pick up your haul?

A. The Canadians have an advantage because of the flexibility of their law and the inflexibility of our laws.

Mr. Baker: I think that is all.

(Witness excused.)

[fol. 179] Mr. Robinson: I would like to ask Mr. Foss one or two more questions.

WEDELL Foss, being a witness recalled on behalf of plaintiffs, having been previously sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Mr. Foss, you testified this morning you were in the towboat business all your life practically?

A. Yes.

Q. You keep pretty well posted what is going on?

A. I do.

Q. You heard the testimony about the Bahada and Warren accidents. Do you know of any other accidents resulting in loss of life in the last few years?

A. Yes, sir.

Q. What?

A. We had three losses of life in a period of 40 years of operation. The Wagner tugboat had one loss of life, and there has been two serious accidents in Seattle Harbor without loss of life.

Q. Tug accidents?

A. Yes.

Q. Do you know whether they were steam or motor?

A. In our three cases they were uninspected vessels and in the Wagner loss it was an uninspected vessel; and the other two, one was steam and one was uninspected.

(Witness excused.)

[fol. 180] CAPTAIN LINDLEY DAVIS, being a witness recalled on behalf of plaintiffs, having been previously sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Captain Davis, is there any tug operations in Seattle where the tugs are used to assist off-shore vessels around the Harbor?

A. Yes, sir.

Q. Any considerable amount?

A. Yes.

Q. What sort of situations arise to require that in Seattle?

A. Oh, some of the ships, the docks are so situated that it is hard to get in and out without a tug. It takes them a long time, and sometimes the wind is so they can't and they use a tug to assist them in docking and undocking; and sometimes in shifting, if they come in and the machinery is disabled, and they shift from dock to dock while loading or discharging. Shipping vessels go in from the sea, quite a few.

Q. I believe your company has more vessels in this suit than any other one company. Have you had any major accidents in the last eight or ten years?

A. No, I don't recall ever having a major accident, as to loss of life or injury.

Q. You mean any loss of life?

A. As I recall, we have never had any loss of life on any of our tugs.

Q. You have heard of the Bahada and the Warren accidents?

[fol. 181] A. Yes, sir, the same fleet the Bahada belonged to before I had anything to do with them, and the rest of that fleet is under my jurisdiction partly now; but, as far as the boats I have been managing, we have never lost any.

Q. You heard of those two accidents when they occurred?

A. Yes.

Q. Do you know of any other tug accidents comparable in seriousness with those that haven't been mentioned here?

A. No, I don't know of any comparable with those at all. I have known of some one or two men in years past. I think there was a gas boat a couple of times caught fire.

Mr. Robinson: That is all.

(Witness excused.)

Mr. Robinson: I will call the defendant Captain Parker.

CAPTAIN HOWELL PARKER, being a witness called on behalf of plaintiffs, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Captain Parker, you are the marine inspector appointed by the Director of Labor and Industries, under this Act, are you not?

A. Yes, sir.

Q. You have held office now about two years, is it?

A. No, about a year and a half.

Q. I suppose you are a man with considerable marine experience?

[fol. 182] A. About thirty-five years.

Q. Yes. Now, have you actually inspected some vessels under this Act?

A. Yes.

Q. Have you inspected and issued certificates of inspection to them?

A. Yes.

Q. What did you do, Captain? Tell us what your inspection consisted of.

A. Oh, surveyed the hull for seaworthiness; surveyed the tanks for safety, and ordered life-saving equipment, lifeboats, and ordered safety valves on the air pressure tanks; looked after the sanitary part of the living quarters where men sleep; and, where they didn't have this equipment, gave them orders to put it on.

Mr. Baker: If the Court please, I want to object to further testimony along this line. It seems incompetent to establish whether or not the State has power to do these things by what the inspector has done under the law.

The Court: That might go to the allegation of what they are going to do.

Mr. Baker: We have admitted that.

Mr. Robinson: You stand by the allegation in your Answer?

Mr. Baker: By the allegation in our Answer, and we want to make it so clearly understood, so there won't be any question that we eschew and disavow any right to inspect any steamboat of any construction of——(interrupted.)

Mr. Robinson: We understand that now.

[fol. 183] Mr. Robinson:

Q. Did you ever inspect any? Did you ever inspect any steamboats?

A. Yes, sir.

Q. I mean under this Act.

A. Yes.

Mr. Robinson: I just want to qualify myself for having brought it out. He says he has inspected them.

Q. You are going to quit from now on?

A. One was on Lake Whatcom and one on land-locked waters.

Q. I thought so. Now, Captain, have you examined and issued licenses to various pilots, engineers and masters? What does your license cover when—wait a minute.

Mr. Robinson: Not to take time—you may object to this as immaterial. I wonder if you could furnish me samples of some license issued. Are you willing to?

Mr. Baker: Yes. I think we have copies of them.

Mr. Robinson: I suppose they are public property, aren't they?

Mr. Baker: I don't know why they shouldn't be.

Mr. Robinson: I saw one, I think, Captain, purported to be issued by you for motor vessels of two 100 tons motor vessels on Puget Sound as far as Port Townsend, and maybe is said something about Bellingham. Do you issue a license for all the waters in the State?

A. Only for the waters for which the men take an examination.

Q. Oh, I see. This is what I am trying to get at. I saw [fol. 184] a Puget Sound license. If a man was going to operate under your license, what kind of a license would he get?

A. A license for Grays Harbor.

Q. If he was going to operate around Longview and around there?

A. I never issued any license down there.

Q. Do you know what you intend to do about it?

A. No.

Q. So, if a man wanted to work both places, on Puget Sound or Grays Harbor, he would have to get two licenses?

A. No, take his examination for both ports.

Q. At the same time?

A. Yes.

Q. It would be possible for him to stand an examination for all ports and waters and get it if he specified it?

A. Yes, sir.

Mr. Robinson: That is all. Can I have some samples of those licenses tomorrow, Mr. Baker?

Mr. Baker: I don't have any with me.

Mr. Robinson:

Q. Have you some, Captain?

A. Yes.

Mr. Robinson: I don't know if I want them, but I would like to have them.

[fol. 185] Cross-examination.

By Mr. Baker: Just one question. May I ask the Captain a question here?

Q. Captain, have you inspected any motor boats on the Harbor and on inland waters and not land-locked waters which are subject to inspection, or have you issued certificates of inspection to those boats which are subject to be inspected by the Federal Government?

A. No.

Mr. Baker: That is all.

(Witness excused.)

Mr. Robinson: If the Court please, I will ask the Court to take judicial notice of the fact the Federal statute provides, among other things, that the Commissioner of Navigation, head of the Bureau of Navigation, and operating under the Secretary of Commerce, is directed to, each year, to report, among other things, to the Secretary of Commerce, changes which are required in the navigation laws; and, among other things, to report the activities of that Bureau which, up until a year and a half ago, was a distinct one from the steamboat inspectors, to the Secretary of Commerce; and I offer in evidence a number of reports [fol. 186] covering the years 1930—wait a minute, I think I begin earlier than that—1929, 1930, 1931, 1932, of that Bureau. And, in addition to that, I offer it, because I have it in no other form, the report for '33, which is contained in the report of the Secretary of Commerce to Congress and the same of 1934. Al of these reports which I offer are certified under the seal of the Secretary of Commerce.

Mr. Baker: Reports of what Bureau are they?

Mr. Robinson: They are for '29, '30, '31, '32, '33 and '34. Now, there are only certain parts of those, of course, that I want to use, and I don't know whether I ought to read those parts right now or wait until argument. I suppose counsel ought to be advised of them, and I suppose I ought to read in what I want.

Mr. Baker: I think you can read it as part of your argument because, if you are offering them in evidence, I would like to know what they are in the first instance, and it is my conception that you are offering them in evidence. It isn't necessary to read them at the time. You can make your argument from them.

Mr. Robinson: It is only a matter of saving time. I had anticipated putting them in, but I thought you might want evidence on it.

Mr. Toner: We would like to know what they are.

Mr. Robinson: Well, I will take one of them which is [fol. 187] typical of the lot. It is the same matter I want to use in each of them from the report. As I have stated, I can cite the law to the gentlemen if they wish it. This is required by law to be made by the Commissioner of Navigation to the Department of Commerce, and I will say

that my purpose of using these reports is to show that, entirely independent of the steamboat inspectors and outside that field, there is a big field of inspection which Captain Hutchins, I hoped, would explain to us, but which he very pointedly refused to say anything about.

I am reading from page 3 of the report of 1932:

"The Bureau, from time to time, has suggested the desirability of amending the steamboat inspection laws to cover fully the inspection of the increasing number of large vessels propelled by internal combustion engines.

"The tonnage of such vessels aggregates nearly a million tons, many of them large tonnage, carrying passengers and cargo in trans-oceanic trade, and navigated under conditions equally dangerous with those of smaller vessels propelled by steam. It would seem that they should be under the same requirements as to inspection.

"There are, in the United States, in the neighborhood of 300,000 vessels propelled by internal combustion engines, many of them small and operating on sheltered waters. It [fol. 188] is doubtless advisable, therefore, that such legislation should be restricted to vessels of larger size, possibly 100 gross tons and over."

I read, also, from page 5, Regulation of Small Motor Boats:

"The use of small motor boats on the sheltered and inland waters of the United States is expanding rapidly and, as they are a growing factor in small commerce and recreation, their regulation is of wide interest. On the navigable waters of the United States there are approximately 260,000 of these small vessels numbered and recorded in the Custom houses. It is safe to estimate that there are at least 400,000 such vessels. This number is now the highest in the history of motor boating.

"As these vessels are used by millions of our citizens during the year, Congress has paid special attention to their life-saving equipment, navigation and supervision. Under existing law, however, every provision seems to have been made which is reasonably necessary to the protection of those on board and if these small motor boats are operated in compliance with the laws now in force, a reasonable degree of safety will be attained."

I read from the bottom of the page under the caption, "Navigation Patrol Service."

"One of the important duties of our patrol fleet of six vessels, which cover the Atlantic and Gulf Coast and a part of the Great Lakes, is supervision of the life-saving [fol. 189] equipment on our 260,000 small motor vessels. At its inception the navigation of small motor vessels was dangerous. Improved hull construction and machinery has removed to a considerable extent the risk on these vessels and where they maintain proper life-saving equipment in accordance with the requirements of law, the loss of life is almost negligible. It is the duty of the patrol fleet to see that all vessels are equipped with life-saving devices.

"Another important duty is the supervision of the welfare of seamen in our coast-wise trade; to see that their wages are paid, and that they are given proper quarters and food. These patrol vessels, also, so far as opportunity offers, prevent the over-crowding of excursion steamers and see that larger vessels not only have their equipment on board, but licensed officers and crews."

I call attention, also, to a table on page 8, which is headed this way: "The following table shows the work done by the various branches of the Federal service engaged in the enforcement of navigation laws." And here is a table that shows the various districts, and we will refer only to Seattle:

"Seattle, 1,176 violations; 124 of them reported by the Coast Guard; 1,036 by the Customs Inspectors; and 16 by the Navigation Inspectors."

And just below that is this:

"Of the 8,062 cases reported, 3,733 were discovered by the Bureau's patrol boats. The record of the work of these vessels is better shown by the fact that, during the year, [fol. 190] the- made 31,079 inspections."

"I call particular attention to the word "inspections." "From these inspections but 3,733 violations of law were discovered. In other words, it was necessary to inspect approximately 10 vessels before even a technical infraction of the law was found."

Now, I will say to counsel that I have this report from '29 to '33, inclusive, the last two being contained in the Secretary of Commerce's report, all of which have the same data. Most of them refer to the same things I have spoken about, although not in the same language, and I thought this should be read to advise you of what I was doing, and I will read the rest if you wish.

Mr. Baker: No. What were the first reports from?

Mr. Robinson: They were all from the Bureau of Navigation except the last two. They are certified by the Secretary of Commerce.

Mr. Baker: Those reports are not competent to prove the issue involved. There isn't any question as admitted, and the testimony has proven to the Court that the Federal Government makes inspections or check-ups, but there is a whole blank field of a decided nature covering a definite scope in it the Federal Government doesn't meet, for instance, below decks of motor boats, no matter what size. Those particular reports have no bearing on the question as to whether or not the State has the power to inspect and [fol. 191] regulate and license people who take care of these duties the Federal Government has no duties or concern with. That is the reason I object to the reports.

The Court: I think they may be admitted with the understanding the argument Mr. Baker is making is properly made at the close of the case; and if it is relative, then——

Mr. Baker: I am arguing on the admissibility of them.

The Court: I understand.

Mr. Robinson: I am sure of the admissibility but, in view of the Court's ruling, I reserve that for the end of the case.

I will say further, Gentlemen, I have uncertified copies of almost all of this, or most of it, and if you want the loan of them overnight, I will loan them to you.

Mr. Baker: We consider them immaterial.

Mr. Robinson: They are very material, and you had better look at them.

Mr. Baker: I will be glad to look at them.

(Reports admitted in evidence as plaintiff's exhibits 6, 7, 8, 9, 10 and 11.)

Mr. Baker: We have one more witness to call and that will complete our case when Mr. Robinson——

Mr. Robinson: You call him while I look at this; otherwise, I am through with my testimony.

[fol. 192] KENNETH DURHAM, being a witness called on behalf of defendants, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Your name?
A. Kenneth Durham.
Q. You are an attorney in the practice in Seattle?
A. Yes.
Q. Mr. Durham, you were connected with the Department of Labor and Industries at one time?
A. Yes, sir.
Q. In what capacity?
A. As supervisor of Industrial Insurance and, for a short time, as Director of Labor and Industries.
Q. Mr. Durham, during the time you were connected with the department as supervisor, or director, or do you know of your own knowledge, whether the department at that time inspected vessels on navigable waters of the state, navigable waters?
A. They did.
Q. Will you tell us when that was?
A. I haven't checked the records lately, but about 1922 or '23 for a short time. All that time it was the position of the department that that inspection was under the authority of our department, and for a short time they actually did inspect a number of tugboats, on Puget Sound. I believe the inspector's name was Stuth, but, due to the lack of appropriations at the time, there was no full-time man, and need for other inspection work, and it was discontinued [fol. 193] and he was sent over to inspect on Chelan and one or two other inland lakes, for a few weeks at a time, so he would be available for general safety inspection in the camps.

Mr. Baker: You may inquire.
Mr. Robinson: No questions.
(Witness excused.)

Mr. Robinson: I have an annual report of the United States which is not certified to. If you object to it—— (interrupted)

Mr. Baker: Do you want to put it in?

Mr. Robinson: Yes.

Mr. Baker: For what purpose?

Mr. Robinson: I will tell you what I want it for. The Coast Guard is required by law to tabulate the number of deaths in the marine service occurring on all vessels in the United States waters and throughout the world as long as they bear the American flag. I want to show in 1930, for instance, being the only one I have, that the aggregate number of passengers and crew lost in all marine disasters of vessels was 310. All American vessels all over the United States and wherever the vessels, the American vessels all over the world. I don't need to put it in.

[fol. 194] Mr. Baker: I don't object to the form of the evidence, but I object to its materiality. I call your attention, if you consider that to be of value, you might consider the Morro Castle and other disasters.

Mr. Robinson: I would like to have you mention that. She was an inspected steamboat.

Mr. Baker: I point out the fact those figures aren't reliable. I don't have any objection if you want to put it in.

Mr. Robinson: I withdraw the offer.

(Whereupon an adjournment was taken until ten o'clock a.m. March 28th, 1935.)

(Upon reconvening, the following proceedings were had and testimony taken:)

Mr. Robinson: If the Court please, I didn't close my case last night because there were one or two things I thought I might want to go ahead with and I might want to go ahead a little further.

[fol. 195] W. H. SUTTER, being a witness called on behalf of plaintiff, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. What are your initials?

A. W. H. Sutter.

Q. Mr. Sutter, you were for many years a Deputy Commissioner of Labor in the Labor Department of the State?

A. Yes, sir.

Q. If my information is correct, you became so early in 1913?

A. Yes, under the administration of Governor Lister, I think it was, '13. I think I have the credentials here. It was the only thing I could find.

Q. You have your commission in your pocket, haven't you?

A. The only thing I could find. I have discarded everything. I think it was 1913. Maybe it is in my overcoat pocket. I had it out looking at the date. I think it was '13. Whenever Governor Lister was elected. He was elected in '12 and——

Q. At any rate, right after Governor Lister took office, you became a deputy in the Labor Department?

A. Yes, sir.

Q. And Governor Lister took office in January, 1913?

A. I think my commission read April.

Q. It did. I read it this morning.

A. Here it is. I have it here. It is the only record I have here. April 12th, 1913. There it is right there. Signed by E. W. Olson.

[fol. 196] Q. You continued in the Labor Department all through the service of Governor Lister and all through the time that Governor Hart was Governor, and a little time in the time of Governor Hartley?

A. A short time in Hartley's administration, yes.

Q. You were in the Labor Department and Hartley took office in 1925, so you were there something over twelve years?

A. Something like that. I know I left the Hartley administration shortly after Hartley was in.

Q. During the twelve years you were in the Labor Department, who was marine inspector under the State Regulation of Vessels Act?

A. When I first went in, I succeeded Mr. Stone and Hoage and I were inspectors together. I was inspector of machinery equipment. We had very few boilers and Hoage was inspector of captains.

Q. You mean when you went in you became such inspector?

A. Yes, sir.

Q. And remained so all the time you were there?

A. Yes, sir.

Q. Wasn't there a time all of it was under your direction?

A. Yes; I think about three years later, Mr. Hoage left the Department and I had to take both captain and engineer.

Q. During those twelve years, Captain, did you or the Department inspect any vessels on the navigable waters of the United States; that is, on salt water?

A. No.

Q. You did not?

[fol. 197] A. No.

Q. I will ask you if you inspected vessels on Lake Union.

A. I did for a while. I inspected vessels on Lake Union. I think it was the old Brasel Hursey's tugboat. She was a steamer.

Q. Why did you cease inspecting that?

A. As soon as the Canal was dug through they took it away from me.

Q. Who?

A. I suppose the Federals took it away, and later I think the boat was condemned. There was a good deal of comment about the boat at the time. I believe Mr. Short went out with me and he said as long as the boat was under State inspection, they had no record of its blueprint before the boat was put in commission, as the Federal was now, and several times I wondered if we were exceeding our right to inspect the boat without a blueprint; but our law didn't say it needed a blueprint, and they said it would come under the Federal as soon as the waters were opened to the Sound and they would condemn it because they didn't have a blueprint of it before it was built.

Q. When the lake was opened so it became connected with navigable waters, you ceased examining it?

A. I had nothing to do with it after that.

Q. Do you know Kenneth Durham?

A. I believe he worked with the Department somewhere when I was there.

Q. He left before you left, didn't he?

A. I don't remember. I think I left before he did. I [fol. 198] wouldn't swear he was there at the same time, but I think I knew Kenneth.

Cross-examination:

Q. Were you connected with the Department when Mr. Durham was the Supervisor of Industrial Insurance?

A. Well, I tell you I couldn't say if I was or not, because I have seen him so many times since and after I left the Department I carried on some similar work. I don't remember.

Mr. Robinson: Didn't Mr. Durham give dates?

Mr. Baker: I think he said he was there from 1923 on.

A. I wouldn't say he wasn't. Going right on with the same kind of work——(interrupted)

Mr. Robinson: I am not contradicting Mr. Durham, anyway.

Mr. Baker:

Q. Mr. Durham testified he was the Supervisor of Industrial Insurance a part of the time when he was acting Director of the Department. I think it was from 1923 on he was. For a short time, under that administration, the Department of Labor and Industries inspected vessels on the Sound under the authority of this 1907 Act. You aren't prepared to state that wasn't true?

A. No. I know I didn't inspect any, but maybe Gill Day that took my place or—I didn't do it.

Q. The only thing you say is you didn't?

[fol. 199] A. I didn't inspect boats on Puget Sound at all.

Q. You don't know what happened after you left?

A. No.

Redirect examination.

By Mr. Robinson:

Q. You say you were inspector from 1913 to 1925, and during that time no boats were inspected on Puget Sound?
A. No.
Q. And neither you or the marine inspector inspected them?
A. No.

Recross-examination.

By Mr. Toner:

Q. Where did you get your authority?
A. From the Labor Commissioner.
Q. It wasn't your business to look at the law and see if you could inspect boats in Puget Sound?
A. I was just working under my boss, the Labor Commissioner.
Q. You did what you were told to?
A. Yes.
Q. You didn't inspect any boats in Puget Sound?
A. My understanding was I had to go around and look up boats, go through the lakes and see if any boats were for hire. We did not inspect boats not for hire. There are many boats on the lake in this state here that we didn't inspect at all because they were not carrying passengers for hire. I will cite another instance. I don't know what this is about. I was called here hurriedly. For in-
[fol. 200] stance, there was a tugboat on Lake Wenatchee. Lake Whatcom. I had three steamers up there, I think. the Margaret and another one, I forget the name. They had one or two boilers and I inspected those. I went over and inspected one of the tugboats carrying for a mill, and I was kicked out because they weren't for hire. It was their own business and they were hauling their own logs.
Q. Who sent you out there?
A. Nobody. When I saw a boat I went over and asked if it carried for hire, boats for hire, and if so, I inspected them. The only thing inspected on the private boats was lights.
Q. Not machinery?

A. We had no jurisdiction over private launches not carrying for hire, and we assessed the fee on them, fee from $15 to $20, on boats carrying passengers for hire.

Q. You did what your superiors told you to do?

A. Yes, sir.

Mr. Robinson:

Q. Was there a record made of all these inspections and the things you did?

A. There is regular records filed. A regular form to fill out, questions and answers. I suppose they have the same thing yet.

Q. Unless it is destroyed, that record should be in the Department?

A. I used to keep records of my own, but I think I destroyed them.

Mr. Robinson: I think that is all.

[fol. 201] Mr. Baker: Just a minute. That is all, no questions.

(Witness excused.)

WEDELL Foss, being a witness recalled on behalf of plaintiffs, having been previously sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Mr. Foss, referring to the two fleets of tugs of the Foss Company and the Foss Tug and Launch—(interrupted)

A. Launch and Tug.

Q. Launch and Tug Company, I will ask you, if, as a matter of fact, any of your masters or engineers do have Federal licenses?

A. Yes, they do.

Q. How many of them?

A. I should say from 30 to 50 percent, possibly more.

Mr. Baker: I think this line of testimony is immaterial, as long as the Federal statute doesn't require it.

Mr. Robinson: I know the Federal statute doesn't require it. That is conceded. I want to find out if you people are

going to require a State license if the man has a Federal license.

Mr. Baker: As a matter of fact, if the state statute provides for it and the Federal Government doesn't provide [fol. 202] for it, it would be within the power of the state to require it. After all, if a man, of his own desire, proceeds to take out a license the Federal Government doesn't require, it doesn't affect the regulations of the state because the law is well settled along those lines.

The Court: The testimony is in.

Mr. Robinson:

Q. These men have licenses of the Federal Government in some cases, authorizing them to serve as engineer or pilot on much larger boats than they are now on?

A. Yes, sir.

Mr. Baker: No questions.

(Witness excused.)

Mr. Robinson: I think that is all.

Captain Howell Parker, being a witness recalled on behalf of defendants, having been previously sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Captain, you have already been sworn?

A. Yes.

Q. In 1907, at the time this state inspection law was passed that is now in question, what were you then doing by way of occupation?

A. I was working as a master of one of the tugs of the Crosby Towboat Company.

[fol. 203] Q. You were master at that time?

A. Yes; sir.

Q. Were you affiliated with any organization of seamen?

A. I was a member of the National Pilots and Masters Association.

Q. At the time of this bill was there any discussion relative to the intents or purposes of this statute?

A. Yes, it was discussed.

Mr. Robinson: Between whom?

A. Between the members of that organization at the regular meeting, brought up on the floor; as the Federal Government had repealed that act, it was time for the State to step in and do something because, in the future, there would be a great many internal combustion engines, and it was brought up and discussed, and that is the father of the bill, I believe.

Mr. Baker:

Q. Who sponsored the bill?

A. I understand the masters, mates, and pilots did.

Q. Is the masters, mates and pilots, is an organization composed of whom?

A. Of the masters of ships, steamships, passenger ships, and towboats.

Q. Of men entirely engaged in running boats on land-locked waters?

A. What do you mean, the lakes?

Q. Yes.

A. None of those men belong to masters, mates and pilots.

Q. So the bill was sponsored by men engaged on the navigable waters of the State.

[fol. 204] Mr. Robinson: We have been liberal with each other on this. I won't move to strike, but I will say it is immaterial and irrelevant.

Cross-examination.

By Mr. Robinson:

Q. Here is a placard I have in the Complaint. That was gotten out under the orders of your department, was it not?

A. I don't know. It was gotten out before I took office.

Q. It was distributed through the community during your period of service, was it not?

A. It probably was.

Mr. Robinson: I want to put this in evidence. There is a copy of it in the complaint and it is admitted, but I want it in, itself if you have no objection.

Mr. Baker: It bears the Department's stamp. I don't think anyone would forge it.

Mr. Robinson: It is an exact copy.

Mr. Baker: I don't doubt that is an exact copy.

(Placard admitted in evidence as plaintiff's exhibit 12.)

(Witness excused.)

[fol. 205] MOTION TO DISMISS

Mr. Baker: The Department, the defendants, or three of them, now rest their case, and we again move to dismiss some of the Complaint in this action on the grounds, on the ground the Summons and Complaint fail to state cause of action entitling the Claimants to the relief they ask for.

Now, I want to tender the Court an argument on that. It is no more than a recitation of our demurrer, but I think it is proper at this time to challenge the Summons and Complaint at any time throughout the proceedings. We want to make our record clear. At this time, we think the Court, in all probability, will reserve decision until argument on the case, as a whole, and we reserve our argument until that time.

The Court: Yes, that is all right.

(Whereupon both sides rested.)

[fol. 206] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

MEMO. OPINION

It is impossible for this Court to reconcile many of the authorities cited by counsel. However, after a rather thorough consideration, it is the opinion of the Court that the act complained of is susceptible of a construction by the defendant that would not be overlapping the field cov-

ered by Federal law. In so ruling, the Court is expressing no view as to the specific acts on the part of the defendant.

An order may be taken in conformity herewith.

(Signed) D. F. Wright, Judge.

[fol. 207] (On Monday, the 24th day of June, 1935, the following additional proceedings were had in the above entitled cause, towit:)

STATEMENT RE PROPOSED ORDER

Mr. Robinson: The Court please, in this matter, Mr. Toner has given me a copy of a proposed order which I understand accords with the Court's opinion as I understand it. I have asked the reporter to be present for this reason.

During the preliminary arguments, I think it was the argument on demurrer, Mr. Toner suggested that I do not prevail in this case unless Your Honor should hold that no part of this law ought to be enforced against these people; and, of course, the order is in those terms. At that time I contended that I had set forth certain acts, threatened acts, which were admitted—no, not admitted at that time, but I had set forth certain threatened acts and that under any prayer for order prayed for and such other relief as I might be entitled to, and to what lesser prohibition than I had prayed for; And then, after the matter was answered and it was admitted, those acts threatened, and one done, it seemed to me I would be entitled to some sort of an injunction if any of the acts complained of were not lawful.

Your Honor, if I remember your opinion correctly, sug-
[fol. 208] gested that you were not convinced but what there might be some things in that law which did not overlap the Federal law, but did not pass upon any of the acts.

Now, I am afraid in the present state of the record, if I get into the Supreme Court, they might say to me: "You didn't ask the court below to enjoin any specific acts." I am now making that request. I will add, however, I don't think it makes much difference if you enter this order or not, because the Court will have the matter before it, and the matter would be de novo here; and the reason I am asking it is so it will not be said I never raised that point

in this court; and, for that reason, I have asked the stenographer to be here; and I will ask Your Honor to instruct her, when she furnishes me the Statement of Facts, she may include this statement I have made here today.

The Court: Yes, certainly.

(Whereupon the case was closed and no further proceedings were had.)

[fol. 209] ORDER SETTLING STATEMENT OF FACTS

On this 14th day of December, A. D. 1935, pursuant to due notice of application for settlement and certification of the Statement of Facts in the foregoing entitled action, the parties to said action appearing by their respective attorneys of record herein, the undersigned, Honorable D. F. Wright, Judge of said court presiding at the trial of said action, now hereby settles the annexed and foregoing Statement of Facts as the Statement of Facts in the said action and Hereby Certifies:

That the matters and proceedings embodied in the annexed and foregoing Statement of Facts, exhibits and other written evidence introduced and offered in evidence upon the trial of said action, and filed in said cause, and now marked and identified by me as follows: Plaintiff's Exhibits 1, 3, 4, 6, 7, 8, 9, 10, 11 and 12; Defendants' Exhibits 2 and 5, referred to and identified in the foregoing proposed Statement of Facts, are matters and proceedings occurring in said cause, and the same are hereby made a part of the record therein; and that the same contain all the testimony on which said cause was tried; evidence produced or offered by either of the parties to said action, together with all of the objections and exceptions of counsel, taken to the reception or rejection of testimony, and the rulings of the Court therein, all documents and instruments in writing introduced or offered in evidence, and all the material facts, matters and proceedings heretofore occurring in said cause, and not already a part therein; and the Clerk is hereby ordered to attach to the said Statement all of the said original exhibits on file in said cause as herein identified and which the Clerk of this court is ordered to transmit to the Clerk of the Supreme Court.

Done in open court this 14th day of December A. D., 1935.

D. F. Wright, Judge.

Service hereof admitted and copy received this 31st July, 1935.

W. A. Toner, Attorney for Defendants.

[fols. 210-236] Appellants' abstract of record, filed January 31, 1936, omitted in priting.

[fol. 237] In Supreme Court of Washington

En Banc

No. 26052

The State of Washington on the Relation of Foss Company, Inc., a Corporation, et al., Appellants,

v.

E. Pat Kelly, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of the Safety Division of said Department, and Howell Parker as Deputy of said Director, under the title, Marine Inspector, Respondents

Opinion—Filed July 9, 1936

The appellants, as plaintiffs, by this action sought the issuance of a writ of prohibition to prevent the defendants from in any manner enforcing or attempting to enforce chapter 200, Laws of 1907, as against them. From a judgment of dismissal, entered after trial on the merits, the plaintiffs have appealed.

The material facts are now very little in dispute and may be briefly summarized as follows: The appellants own and operate one hundred thirty nine motor driven tugs, of which one hundred eleven are less than sixty-five feet in length. Some of these tugs are registered and the remainder are all enrolled and licensed under Federal laws. For the most part, these tugs are employed in intrastate

commerce, but some tow to and from British Columbia ports and some tow back and forth across the Columbia river, or from other ports in Washington to ports in Oregon. Practically all of these tugs are capable of engaging in interstate or foreign commerce and will do so if and when opportunity offers. Some of the larger tugs have [fol. 238] towed and will tow to California ports. The main business, however, of most of the tugs is confined to moving vessels engaged in interstate and foreign commerce, and other work in and about the harbors where they are stationed.

The United States Government has for many years maintained a steamboat inspection service, but neither that nor any other Federal agency has been empowered by Federal legislation to inspect motor driven tugs for seaworthiness or as to the condition of their mechanical equipment, or to license the officers who operate them.

Chapter 200, Laws of 1907, is a comprehensive and complete code for the inspection and regulation of every vessel operated by machinery which is not subject to inspection under the laws of the United States.

It is charged by the complaint and admitted by the answer that unless prohibited the department and its officials will (1) enforce as against the appellants and their vessels the provisions of §9 of the act referred to, relating to signal lights; and (2) that appellants will be proceeded against for penalties unless, among other things, they will do the following:

"(a) Submit such vessels to inspection annually or oftener if the director shall deem it reasonable, at a cost to said owners of not less than five nor more than twenty dollars for each inspection.

"(b) Make such changes, repairs and improvements as said director may thereupon require.

"(c) Carry such officers on said vessels as the Director shall after examination license as masters, pilots, and engineers.

"(d) Carry such crews as he shall deem necessary to manage each vessel with safety.

"(e) Carry such life saving equipment as he shall require and approve.

"(f) Carry such fire prevention apparatus as he shall require and approve.

"(g) Keep on board at all times a copy of the license to be issued by the director authorizing the vessels to navigate in and upon the waters within the territorial limits of the state, the same to be posted in a conspicuous place.

[fol. 239] "(h) Keep a copy of the first twenty-two sections of the act posted in a conspicuous place on said vessel.

"(i) Keep two copies of the navigation rules set out in section 8 of the act posted in the vessel, one in the pilot house, the other in a conspicuous place.

"(j) Keep the vessel's name painted on her stern in the character and colors prescribed by section 16 of the act.

"(k) Comply with all orders, regulations and requirements of the Commissioner (Sec. 25)."

The appellants' main contentions are (1) that Congress has exclusive power to make laws for the government of foreign and interstate commerce, which includes the power to make rules governing navigation upon the navigable waters of the United States; that as to some things its power is absolute and exclusive and as to others, where there is a concurrent power, legislation by the state must give way when Congress has occupied the field whether such legislation conflicts with Federal legislation or not; and (2) that therefore the state had no right to legislate as to most of the provisions of the act in question. Some other questions are presented which, however, it does not appear necessary to consider.

There are lakes within the state which are navigable. These are land locked and both sides agree that the state has exclusive jurisdiction of all matters pertaining to the navigation thereon and that this act of the legislature may and does apply to all vessels operating on such land locked waters.

Within, or adjacent to the boundaries of the state, are also navigable waters known as inland waters, over which the Federal Government has control, and the high seas, over which the Federal control is limited by international rules which our government has adopted by agreement with other maritime nations.

While the appellants' tugs mostly operate in inland waters, some go upon the high seas and, in any event, if the [fol. 240] state may not legislate in the manner here disclosed with reference to operations in inland waters, of course it cannot do so with reference to operations upon the high seas.

The Federal legislation with respect to vessels and navigation in navigable waters is of vast extent and seemingly it covers every situation and condition which the Congress has considered to be necessary or advisable to cover. Even row boats are required to carry a lantern showing a white light to be exhibited under certain conditions. U. S. C. Title 33, §77.

All of the vessels involved in this case, whether registered or enrolled and licensed to engage in the coastwise trade, come under the Federal legislation. Motorboats not more than sixty-five feet in length are defined and regulated by chapter 16, Title 46, U. S. C. True, that chapter does not require inspection for seaworthiness or the examination and licensing of officers, but presumably, Congress went as far in the regulation of such boats as it thought to be necessary.

"This doctrine of a general concurrent power in the states is insidious and dangerous. If it be admitted, no one can say where it will stop. The states may legislate, it is said, wherever Congress has not made a plenary exercise of its power. But who is to judge whether Congress has made this plenary exercise of power? Congress has acted on this power; it has done all that it deemed wise; and are the states now to do whatever Congress has left undone? Congress makes such rules as, in its judgment, the case requires; and those rules, whatever they are, constitute the system." Gibbons v. Ogden, 6 Law Ed. (2d) 23.

Upon this question of occupancy of the field, the railroad cases seem to be in point and to support our view that Congress has here occupied the field. Northern Pacific Railway Co. v. Washington, 222 U. S. 370, and Southern Railway Co. v. Railroad Commission of Indiana, 236 U. S. 439.

The exception to this rule, if it be an exception, seems to be with reference to state legislation affecting pilots and pilotage. In Cooley v. Board of Wardens of Port of Phila- [fol. 241] delphia, 12 Howard, 299, the Federal Supreme

Court upheld legislation by the state of Pennsylvania on this subject on the ground, apparently, that though Congress had the power to regulate and when a uniform rule was necessary that power was exclusive, yet as to pilotage, uniformity was not necessary and the states might act. It was there said:

"* * * This provision of the Constitution was intended to operate upon subjects actually existing and well understood when the Constitution was formed. Imposts and duties on imports, exports, and tonnage were then known to the commerce of a civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial states enforced their pilot-laws, as they were from charges for wharfage or towage, or any other local port-charges for services rendered to vessels or cargoes; * * * it also follows, that this law is not repugnant to the first clause of the eighth section of the first article of the Constitution, which declares that all duties, imposts, and excises shall be uniform throughout the United States; for, if it is not to be deemed a law levying a duty, impost, or excise, the want of uniformity throughout the United States is not objectionable. Indeed the necessity of conforming regulations of pilotage to the local peculiarities of each port, and the consequent impossibility of having its charges uniform throughout the United States, would be sufficient of itself to prove that they could not have been intended to be embraced within this clause of the Constitution; for it cannot be supposed uniformity was required, when it must have been known to be impracticable."

This court in State v. Ames, 47 Wash. 328, 92 Pac. 137, recognized the right of the state to legislate on the subject of pilotage and gave the reason as being that Congress had not attempted to regulate the whole subject of pilotage.

Whether this court, in the Ames case, supra, gave the correct reason for sustaining state legislation on the subject of pilotage is not particularly material. Whichever reason be the true one, pilots and pilotage alone seem to stand out as affording a field for state legislation.

We have not overlooked the case of Stewart & Co. v. Rivara, 274 U. S. 614, where a state law as to conditional sales contracts was upheld. The court there pointed out:

"Clearly there is nothing in the state law to interfere with [fol. 242] the use of such vessels as instrumentalities of interstate commerce." It is obvious that the contrary is true here.

The case of United Dredging Co. v. City of Los Angeles, 10 F. (2d) 239, affirmed in 14 F. (2d) 364, holds that local authority may not enforce an ordinance requiring inspection and licensing of officers for the operation of steam dredges operating in the harbor. Language used by the district court as to the police power of the city seems to be entirely beyond the question involved and therefore requires no comment. The question actually decided makes the case an authority against the right of the state to interfere.

Cases are cited which sustain local laws fixing harbor charges and local laws as to liability for torts, but we cannot see their applicability, nor are the ferry cases in point here. The principle which must govern, we think, is laid down in Harman v. Chicago, 147 U. S. 396, where it was contended that a local municipality might, through license fees, exact compensation for the use of the harbor within its limits, which had been by it improved and made usable. After an exhaustive review of the previous decisions of the Supreme Court, Mr. Justice Field said:

"The license fee is a tax for the use of navigable waters, not a charge by way of compensation for any specific improvement. The grant to the city under which the ordinance was passed is a general one to all municipalities of the state. Waters navigable in themselves in a state, and connecting with other navigable waters so as to form a waterway to other states or foreign nations, cannot be obstructed or impeded so as to impair, defeat or place any burden upon a right to their navigation granted by Congress. Such right the defendants had from the fact that their steam barges and towboats were enrolled and licensed, as stated, under the laws of the United States."

So here, the license fee is a tax and the other regulations, speaking generally, are all burdens upon navigation and to some extent upon interstate commerce.

[fol. 243] We have examined with care those cases holding that state legislation as to matters wholly local, or in-

tended to aid commerce, is permissible, such as The Steamboat. New York v. Rea, 59 U. S. 223; County of Mobile v. Kimball, 102 U. S. 691, and other cases of like import. These are based upon the police power and are seemingly limited to strictly local affairs. Of the dozen or more things proposed to be done by the respondents under the state act, not one is purely local. Every one has a tendency to interfere with uniformity and most of them are such as to constitute a burden upon interstate commerce.

We are satisfied that the act is invalid if applied to the navigable waters over which the Federal Government has control. We are confirmed in this view by the fact that in the twenty-nine years since its enactment no real attempt has been made to enforce it against those operating vessels of any kind upon the navigable waters of the United States until the present controversy arose.

The judgment of the trial court is reversed with instructions to enter judgment in conformity with the views expressed.

Tolman, J. Geraghty, J.

We concur: Beals, J. Holcomb, J. Steinert.

[fol. 244] IN SUPREME COURT OF WASHINGTON

26052

DISSENTING OPINION

BLAKE, J., dissenting:

The relators, some thirty-one companies, partnerships and individuals, operating power tugboats and towing vessels of less than sixty-five feet in length in navigable waters of this state, brought this action in the superior court of Thurston county to obtain a writ of prohibition directed to E. Pat Kelly, as director of the department of labor and industries. The writ sought would prevent the director from enforcing or attempting to enforce any and all provisions of chapter 209, Laws of 1907, entitled:

"An Act regulating steam vessels, and vessels or boats operated by machinery, navigating the waters within the jurisdiction of this state, excepting vessels which are sub-

ject to inspection under the laws of the United States, and providing penalties for the violation thereof."

The cause was tried on issues joined by answer to the complaint. From judgment entered dismissing the action, relators appeal.

As indicated by what has been said, relators attack the validity of the act in its entirety. It is a mass attack on the whole of a legislative enactment. Under such circumstances, it is not the function of the court to "anticipate a question of constitutional law in advance of the necessity of deciding it." Steamship Co. v. Emigration Commissioners, 113 U. S. 33; Abrams v. Van Schaick, 293 U. S. 188; Wilshire Oil Co. v. United States, 295 U. S. 100. Nor will the court "decide questions of a constitutional nature unless absolutely necessary to a decision of the case." Burton v. United States, 196 U. S. 283; Stephenson v. Binford, 287 U. S. 251.

[fol. 245] Under such an attack as made by relators, the question to be determined is whether any portion of the act is valid and enforcible. If any portion of the act is found valid and enforcible, the court should not extend the inquiry further nor undertake to say in this action what portion of the act may be invalid and unenforcible. What was said in Steamship Co. v. Emigration Commissioners, supra, is peculiarly pertinent to the method of attack adopted by relators in this case:

"If, on the other hand, we should assume the plaintiff's case to be within the terms of the statute, we should have to deal with it purely as an hypothesis, and pass upon the constitutionality of an act of Congress as an abstract question. That is not the mode in which this court is accustomed or willing to consider such questions. It has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judg-

ment. It is the dictate of wisdom to follow them closely and carefully."

As I proceed, I think it will be apparent why the question to be decided in this case should be so circumscribed.

The question, as circumscribed, dispenses with the necessity of analyzing chapter 200, Laws of 1907, in detail. As [fol. 246] indicated by its title, it contains regulations with respect to the operation of automotive vessels in the navigable waters of this state. The act specifically disclaims any intent to control navigation or regulate vessels in any situation where Congress has enacted legislation upon the subject. Thus circumscribed, the problem resolves itself into two phases: (1) Does the maritime jurisdiction of the United States preclude the state from enacting any regulatory legislation with respect to the operation of vessels on navigable waters within the boundaries of the state? (2) If not, are there any regulations prescribed by chapter 200, Laws of 1907, which cover a field not occupied by Federal legislation?

First. There can be no question but that the United States has primary jurisdiction over the navigable waters of this state. It is also without question that such jurisdiction is exclusive when exercised. In other words, a state may not legislate upon a subject within maritime jurisdiction if the United States has occupied the field. But it does not follow that a state may not legislate upon a subject within maritime jurisdiction when there is no Federal legislation on the subject.

In the case of United Dredging Co. v. Los Angeles, 10 F. (2) 239, the rule is stated as follows:

"It may be admitted that reasonable police regulations may be imposed upon maritime craft, where considerations of safety are present in the locality under the jurisdiction of a municipality. Such regulations must be reasonable ones, and may be enforced, provided that the United States government has not already taken possession of the field in which it has primary jurisdiction. The law applicable was well stated by Judge Brown in The City of Norwalk (D. C.) 55 F. 98, where he said that the rule in favor of [fol. 247] federal jurisdiction did not 'exclude general legislation by the states, applicable alike on land and water,

in their exercise of the police power for the preservation of life and health, though incidentally affecting maritime affairs: Provided that such legislation does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.' "

The rule as thus stated has ample support in decisions of the Supreme Court of the United States. Sherlock v. Alling, 93 U. S. 99; County of Mobile v. Kimball, 102 U. S. 691; Pittsburg & Southern Coal Co. v. Louisiana, 156 U. S. 590. In the case of County of Mobile v. Kimball, supra, it is said:

"The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time be-
[fol. 248] ing, and until it sees fit to act, they may be regulated by state authority."

Regulatory measures by states with respect to railroads engaged in interstate commerce have been upheld on the same principle. Chicago, Rock Island & Pacific R. Co. v. Arkansas, 219 U. S. 453; Vandalia R. Co. v. Public Service Commission of Indiana, 242 U. S. 255. The former case involved the "full crew" act of the state of Arkansas. To the contention that the act was an obstruction to, or placed a burden on, interstate commerce, the court said:

"The validity under the Constitution of the United States of such statutes is not to be questioned in a Federal court unless they are clearly inconsistent with some power

granted to the General Government or with some right secured by that instrument or unless they are purely arbitrary in their nature. The statute here involved is not in any proper sense a regulation of interstate commerce nor does it deny the equal protection of the laws. Upon its face, it must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction, of such commerce and for the protection of those engaged in such commerce."

Second. Now applying the principle of these cases to the facts of the case at bar, we find that the United States has not provided for the inspection of vessels less than sixty-five feet in length, either as to seaworthiness, safety of machinery, or adequacy of crews. The relators operate vessels of less than sixty-five feet in length, which are therefore not subject to inspection under Federal laws. Section 9 of our act does provide for inspection and regulation of [fol. 249] vessels in these respects. True, the provisions do not specifically refer to vessels of less than sixty-five feet in length, but they are none the less effective as to such vessels. Thus there is a field unoccupied by congressional legislation in which our act may be operative. To this extent at least, chapter 200, Laws of 1907, is valid and enforcible. Here the inquiry should stop, since we have found a field in which our act is valid and enforcible. It may be that some portions of our act are in conflict with now existing laws of the United States. If so, such portions of the act must give way. But the whole act does not therefore fall.

On this record, the court is not warranted in granting a writ of prohibition. Relators' rights may be amply protected in specific instances, if and when the director attempts to enforce provisions of the act which are in conflict with the laws of the United States.

For these reasons, I think the judgment should be affirmed.

Blake, J.

We concur in the views expressed by Judge Blake.

Main, J. Mitchell, J. Millard, C. J.

[fols. 250-293] Petitions for rehearing, governing 44 pages, filed August 4 and August 15, 1936, omitted from this print.

They were denied, and nothing more by order of September 3, 1936.

[fol. 294] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER DENYING PETITIONS FOR REHEARING—Filed September 3, 1936

The court having considered the petition of respondents and the petition of Kenneth Durham, as a Friend of the Court, for a rehearing herein;

It is Ordered that the petitions be and they hereby are denied.

By the Court.

William J. Millard, Chief Justice.

[File endorsement omitted.]

[fols. 295 & 296] IN SUPREME COURT OF WASHINGTON

Thurston County, No. 15804

No. 26052

THE STATE OF WASHINGTON on the Relation of Foss COMPANY, INC., a Corporation, et al., Appellants,

vs.

E. PAT KELLY, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of the Safety Division of said Department and Howell Parker, as Deputy of said Director, under the title, Marine Inspector, Respondents

JUDGMENT—September 3, 1936

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 3rd

day of September, A. D. 1936, on motion of John S. Robinson, Esquire, of counsel for appellants, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby reversed with instructions to enter judgment in conformity with the views expressed in the opinion, and that the said Foss Company, Inc., a Corporation, et al., have and recover of and from the said E. Pat Kelly, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of the Safety Division of said Department and Howell Parker as Deputy of said Director, under the title, Marine Inspector, the costs of this action taxed and allowed at Two Hundred Thirteen and 60/100 ($213.60) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 297] [File endorsement omitted]

[fol. 298] IN SUPREME COURT OF WASHINGTON

[Title omitted]

APPELLANTS' REPLY BRIEF—Filed March 4, 1936

It seems advisable to restate our position. We find the [fol. 299] following on page 4 of respondents' brief:

"The contention is made that the law in the first place was intended to apply only to land-locked waters."

That contention was made at the beginning of the case. We attempted to convey the idea on page 58 of our opening brief that we had abandoned it during the trial. In order to avoid any misunderstanding, we now express our complete agreement with the following statement concerning section 8 of the act in question which we quote from page 8 of respondents' brief:

"Since in this particular instance the Legislature pointed out that the rules contained in this section were not to apply to all waters under the jurisdiction of the State, but only to those under its exclusive jurisdiction, it must logically follow that all the other provisions of the Act, excepting as

otherwise provided, were to apply generally to all the waters of the State of Washington, within the State's jurisdiction."

[fol 300] We take it that it is upon the theory that all other sections were intended to apply to vessels navigating waters within the territorial jurisdiction of the state that the Director issued Exhibit No. 12 threatening the appellants with prosecution if they violated section 9 of chapter 200 prescribing the lights to be carried the validity of which section respondents insist upon in paragraph II of their answer in spite of the fact that the necessity of uniformity in the matter of lights is so plain that manifestly Congress alone can deal with it and in the face of the further fact that Congress has dealt with it from the beginning of the government and specifically prescribed the kind and character of lights to be carried on every kind of watercraft, even down to row boats (U. S. C. Title 33, sec. 176).

We take it that it is upon this same theory that all of the sections of chapter 200 except section 8 were intended [fol. 301] to apply to all waters within the territorial jurisdiction of Washington that appellants admit in their answer (paragraph II) that the Director intends to prosecute the appellants and all other vessel owners who navigate vessels (not subject to inspection by the United States Steamboat Inspector) upon waters within the territorial jurisdiction of the state of Washington, unless they

(a) Submit said vessels to inspection annually or oftener at his discretion at a cost to said owners of not less than five or more than twenty dollars for each inspection.

(b) Make such changes, repairs and improvements as said Director may require.

(c) Carry such officers as he shall license as masters, pilots and engineers.

(d) Carry such crews as he shall deem necessary to manage such vessels with safety.

[fol. 302] (e) Carry such life saving equipment as he shall require and approve.

(f) Carry such fire prevention apparatus as he shall require and approve.

(g) Keep on board at all times a copy of a license authorizing the vessel to navigate in and upon the waters of the state.

(h) Keep a copy of the first twenty-two sections of the act (twelve pages) posted in a conspicuous place.

(i) Keep the vessel's name painted on her stern in the character and colors prescribed by section 16 of the act.

(k) Comply with all orders, regulations and requirements of the Commissioner.

Do respondents seriously contend that they can lawfully make those requirements of a Canadian tug which tows a raft of logs from Vancouver, B. C., to Seattle, or a barge from Seattle to Vancouver, B. C.? Do they seriously con- [fol. 303] tend that the appellants, Shaver Transport Co. and Knappton Towboat Co., Oregon corporations, over fifty per cent of whose business is towing across the Columbia River between points in Oregon and points in Washington, must stop that operation unless they submit to these requirements, or do they admit that these foreign tugs have the right to use the navigable waters of the United States without state interference, and seek only to make it impossible for our own tugs to compete with them in our own waters by loading upon them this mass of onerous requirements and regulations? Our clients claim their constitutional right to navigate the public waters of the United States lying within the territorial limits of the state on equal terms with the tug boat operators of British Columbia and Oregon. We say "constitutional right" because every citizen of the United States has the right to navigate its public waters on equal terms. To secure such equal [fol. 304] terms to all was the purpose of conferring the exclusive power of regulation upon the federal government.

All through their case and in their briefs counsel have in a subtle way attempted to convey the impression that in some way "inland waters" are waters over which the states have a measure of control. Inland waters are those public navigable waters of the United States over which the federal government has retained full, complete and exclusive control as distinguished from those waters over which it has surrendered some measure of control by adopting the rules for their navigation agreed upon by the maritime na-

tions of the world; that is to say, The International Rules, Ch. 2, Title 33, U. S. C. At the time of the adoption of the Constitution it was recognized that navigation of the public waters of the United States must be governed by uniform rules. Chief Justice Marshall pointed out in Gib- [fol. 305] bons v. Ogden that to secure that uniformity was one of the primary objects which led to the adoption of the Constitution. As commerce by sea expanded it became clear that not even national uniformity would fully answer; that international uniformity was a necessity on the main traveled entrances, and so Congress established lines within the body of the country, outside of which rules adopted by a convention of the maritime powers should govern and inside of which (on so-called "inland waters") its own rules should govern. In establishing these boundaries of inland waters the federal government surrendered nothing to the states. It did yield something to foreign nations. The federal authority is more absolute and unqualified within these lines than outside. The federal authority is more perfect, thorough, absolute and complete over the waters of Puget Sound, that is, over inland waters of the state, than it is over the waters of Port Angeles Harbor or Neah Bay. [fol. 306] They are waters within the territorial limits of the state but they are outside the line running from New Dungeness Light to Hein Bank separating inland waters from the high seas described on page 6 of respondents' brief. Congress has, in effect, ceded them to the high seas and regulates them in concert with sixteen or seventeen other nations. But over all waters within that line, all waters connecting with the highways of the world and which are indeed part of those highways, all waters upon which the vessels of the appellants operate, the federal authority remains plenary, exclusive, unimpaired and unqualified.

We have shown in our opening brief that Congress has legislated on every point involved. Substantially all of this federal legislation was in effect when chapter 200 was enacted, including most of the provisions of the motor boat code, which were brought together, codified and repassed in 1910. It is not a question of having been superseded by [fol. 307] subsequent enactments. The law, as the present Director now attempts to construe and apply it, was never constitutional. Twenty-eight years after its enactment he

raises this difficulty by reading into the law something which is not there. The language is:

"excepting vessels which are subject to inspection under the laws of the United States."

He construes that as if it read:

"excepting vessels which are subject to inspection by the United States Steamboat Inspectors."

We concede that none of our vessels are subject to inspection by the United States Steamboat Inspectors—but we have shown that all of them are subject to inspection by navigation inspectors, and by special patrol boats of the Bureau of Navigation and Steamboat Inspection Service, by the coast guard, and by all customs officers. This is quite fully shown by the evidence and particularly by Ex- [fol. 308] hibits 6, 7, 8, 9, 10 and 11. If these are not inspections made under the laws of the United States, under what laws are they made? If the court holds that they are inspections under the laws of the United States then by its very terms no part of chapter 200 applies to appellants' vessels. If the court holds that they are not, then the law does apply and is unconstitutional from beginning to end unless, indeed, the following principles are no longer law:

The power to regulate interstate and foreign commerce includes the regulation of navigation and was one of the primary objects which led to its adoption.

Gibbons v. Ogden, 9 Wheat. 567; 6 L. Ed. 23.

"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to [fol. 309] prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislations to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is at the direct provisions made by it * * * the will of Congress upon the whole

subject is as clearly established by what it had not declared, as by what it has expressed."

Southern R. Co. v. Railroad Commission, 236 U. S. 439; 59 L. Ed. 66.

The acts of Congress covering railway equipment are in volume and in particularly a mere drop in the bucket when compared to the acts of Congress regulating vessels, their equipment and life-saving apparatus. Yet the Supreme Court of the United States has said of the laws of Congress concerning railway cars and engines:

"So far as the safety of such vehicles is concerned these [fol. 310] acts operate to exclude state regulation whether consistent, complementary, additional or otherwise."

Gilvary v. Cuyhoga Valley R. Co., 292 U. S. 357; 78 L. Ed. 1123.

We cannot conceive how anyone familiar with the multitude of laws concerning the safety of vessels, of which only a part are cited in our opening brief, can contend that Congress has not dealt with this subject.

Where is there any evidence or indication that it intended to leave any part of this field open to the states and thus invite the destruction of the uniformity of the navigation laws?

Respectfully submitted, John S. Robinson, Attorney for Appellants, 602 Central Building, Seattle, Washington.

[fol. 311] IN SUPREME COURT OF WASHINGTON

[Title omitted]

NOTICE OF MOTION TO RECALL REMITTITUR—Filed October 13, 1936

To the Appellants, Foss Company, Inc., a corporation, et al., and their attorney of record, John S. Robinson:

You and each of you are hereby notified that the undersigned attorneys for the respondents in this cause will bring on for hearing the attached motion to recall the remittitur in this cause on October 23, 1936, at the hour of

10:00 a. m., of said day, or as soon thereafter as the matter may be heard by the Court, at the Temple of Justice, Olympia, Washington.

Dated this 9 day of October, 1936.

G. W. Hamilton, Attorney General; W. A. Toner, Ass't Atty. General, Daniel Baker, Of Counsel, Temple of Justice, Olympia, Washington.

Service of a copy of the original notice of motion and motion is hereby acknowledge- this 10 day of October, 1936.

John S. Robinson; Attorney for Appellants.

[File endorsement omitted.]

[fol. 312] In Supreme Court of Washington

[Title omitted]

Motion for Order Recalling Remittitur

Comes now E. Pat Kelly, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of Safety of the said Department; and Howell Parker, as Deputy of said Director, under the title, Marine Inspector, and requests this honorable Court for an order recalling the remittitur in this cause, sent down from this Court to the Superior Court for Thurston County on the 3rd day of September, 1930, for the reason that the respondents in this cause are about to seek a review of the decision of this Court by the Supreme Court of the United States, and are about to ask that the Supreme Court of the United States issue a writ of certiorari for the purpose of bringing the record of the proceedings in this Court before the U. S. Supreme Court for that purpose.

Respectfully submitted, G. W. Hamilton, Attorney General. W. A. Toner, Ass't Atty. General. Daniel Baker, Of Counsel.

[fol. 313] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER GRANTING MOTION TO RECALL REMITTITUR—Filed October 23, 1936

The motion to recall the remittitur in the above entitled matter having come on before the Court on the 23rd day of October, 1936, and the Court having heard Daniel Baker argue on behalf of the respondents and John S. Robinson having appeared in behalf of the appellants, and the Court being advised in the premises;

It is Ordered that the motion be granted.

By the Court:

William J. Millard, Chief Justice.

[File endorsement omitted.]

[fol. 314] IN SUPREME COURT OF WASHINGTON

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed October 13, 1936

Hon. Benj. T. Hart, Clerk of the Supreme Court of the State of Washington:

The respondents, E. Pat Kelly, as Director of the Department of Labor and Industries of the State of Washington, Jay Olinger, as Supervisor of the Safety Division of said Department, and Howell Parker, as Deputy of said Director under the title, Marine Inspector, propose to petition the Supreme Court of the United States to issue a writ of certiorari directing the Supreme Court of the State of Washington to transmit the record in this case to the Supreme Court of the United States for review on certain questions of law to be specified in said petition.

The said respondents hereby request you to prepare and certify the following documents contained in the record:

(1) The transcript on appeal to the Supreme Court, filed July 17th, 1935, containing,

[fol. 315] (2) The petition for writ of prohibition.

(3) The order of Judge D. F. Wright of the Superior Court for Thurston County granting a temporary writ of prohibition and requiring the defendants in the Court below, and the respondents in the Supreme Court, to show cause why the writ should not be made permanent, entered on December 3, 1934.

(4) The order of December 14, 1934, granting leave to Kenneth Durham to appear as amicus curiæ in the cause.

(5) The order of Judge D. F. Wright continuing the writ of prohibition in full force and effect during the pendency of the proceedings.

(6) The demurrer interposed by the defendants below, and the respondents in the Supreme Court, to the petition for the writ of prohibition.

(7) Answer of the defendants below, and the respondents in the Supreme Court, to the petition for the writ of prohibition.

(8) The memo opinion of Judge D. F. Wright denying the writ of prohibition.

(9) The order of Judge D. F. Wright dismissing the writ of prohibition, entered on March 27, 1935.

(10) The notice of appeal to the Supreme Court of the State of Washington by the appellants in the cause before the Supreme Court.

(11) The bond on appeal of the plaintiffs below, and the appellants in the Supreme Court.

(12) The certificate of the Clerk of the Superior Court for Thurston County, certifying the record to the Supreme Court of the State of Washington.

(13) The statement of facts signed and certified by the trial Judge on the 14th day of December, 1935, and filed in the Clerk's office of the Supreme Court on January 8, 1936. [fol. 316] (14) Abstract of the statement of facts, filed January 31, 1936.

(15) The opinion of the Supreme Court of the State of Washington, together with the dissenting opinion of Judge Blake, handed down July 9, 1936.

(16) The petition for rehearing filed on August 4, 1936.

(17) The order of the Supreme Court denying the petition for rehearing, entered September 3, 1936.

(18) Judgment of the Supreme Court of the State of Washington, entered September 3rd, 1936.

(19) The original exhibits to the Supreme Court, separate and not as part of the certified copy of the record.

(20) Appellants' reply brief to the respondents' brief.

G. W. Hamilton, Atty. General; W. A. Toner, Ass't Atty. General; Daniel Baker, of Counsel, Temple of Justice, Olympia, Washington.

Copy Received 10-10-36. John S. Robinson, Atty. for Appellants.

[File endorsement omitted.]

[fol. 317] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

SUPPLEMENTAL PRÆCIPE FOR RECORD—Filed October 23, 1936

Hon. Benj. T. Hart, Clerk of the Supreme Court of the State of Washington:

You are requested to certify to the following documents in addition to those requested to be certified in the original præcipe:

(1) The motion to recall the remittitur in the above entitled cause.

(2) Order, dated October —, 1936, recalling remittitur.

G. W. Hamilton, Attorney General. W. A. Toner, Ass't Attorney General. Daniel Baker, of Counsel.

[fol. 318] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 162] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 18, 1937

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petion shall be treated as though filed in response to such writ.

FILE COPY

Supreme Court, U. S.
FILED
DEC 2 1936
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 2

E. PAT KELLY, as Director of the Department of Labor and Industries of the State of Washington; JAY OLINGER, as Supervisor of the Safety Division of Said Department, and HOWELL PARKER, as Deputy of Said Director under the Title, Marine Inspector,

Petitioners,

vs.

STATE OF WASHINGTON on the Relation of FOSS COMPANY, INC., a Corporation; ALLMAN-HUBBLE TUGBOAT COMPANY, INC., a Corporation; BELLINGHAM TUG & BARGE CO., INC., a Corporation, et al.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON AND BRIEF IN SUPPORT THEREOF.

G. W. Hamilton,
Attorney General of the State of Washington.

W. A. Toner,
Assistant Attorney General of the State of Washington.

Daniel Baker,
Of Counsel.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	2
Statement of case	3
Reasons relied on for issuance of the writ	10
Supporting brief	15
Opinion of the court below	15
Basis of jurisdiction	16
Statement of the case	16
Specification of errors	17
Argument	18
Summary of argument	18
Point "A"—Sec. 200 of the Laws of 1907 is not invalid because Congress has legislated in a circumscribed area and left the sphere within which said statute is to apply unregulated	20
Point "B"—The State has concurrent jurisdiction with the government to legislate as to navigation and commerce in matters of local concern in the absence of Federal legislation	26
Point "C"—Inspection fees for regulating harbor activities did not constitute an unlawful burden upon interstate commerce	27
Point "D"—State regulations of harbor traffic in the absence of Federal legislation are not unlawful burden upon interstate commerce	28
Point "E"—Regulation of harbor traffic does not interfere with the uniformity of Maritime Law	30
Appendix "A"	33
Appendix "B"	44

APPENDICES.

Chapter 200—Washington Laws of 1907:

Page

Section 1 33
2 34
3 35
4 35
5 36
6 36
7 36
8 36
9 38
12 38
13 39
14 39
15 39
16 40
17 40
18 40
20 41
21 41
22 41
23 41
24 41
25 42
26 43
27 43
28 43

Sec. 362, U. S. C. A., R. S., Sec. 4400; August 7, 1882, c. 441, Sec. 1, 22 Stat. 346 44

Sec. 364, U. S. C. A., R. S., Sec. 4401, Title 46—Shipping 45

Sec. 391, U. S. C. A., R. S., Sec. 4417; December 21, 1898, c. 29, Sec. 4, 30 Stat. 765, Title 46—Shipping 46

Sec. 392, U. S. C. A., R. S., Sec. 4418; June 19, 1886, c. 421, Sec. 14, 24 Stat. 82 47

Sec. 404, U. S. C. A., R. S., 4426; December 22, 1890, c. 26, 26 Stat. 692, Title 46—Shipping 48

Sec. 405, U. S. C. A., R. S., 4427, Title 46—Shipping 49

Page

Sec. 511, U. S. C. A., R. S., Title 46—Shipping; June 9, 1910, c. 268, Sec. 1, 36 Stat. 462 50
Revised Statutes, Sec. 4427, Title 52—Regulation of Steam Vessels 50
Revised Statutes, Sec. 4438, Title 52—Regulation of Steam Vessels 51
Sec. 344, U. S .C. A., Title 28—Judicial Code, Sec. 237 "b" 51

Table of Cases.

Asbell v. *Kansas*, 209 U. S. 251 25
Atchison, Topeka & Santa Fe Ry. Co. v. *Railway Commission of California*, 283 U. S. 380 ..... 11, 25
Atlantic Coast Lines v. *Georgia*, 234 U. S. 280 ..... 29, 31
Blodgett v. *Silberman*, 277 U. S. 1 16
Burrows v. *Delta Transportation Co.*, 64 N. W. 501 ..... 22, 29
Chicago, Rock Island, Pacific Railway v. *Arkansas*, 219 U. S. 453 ..... 21, 32
Chicago, Milwaukee, St. Paul Ry. Co. v. *Solan*, 169 U. S. 133 25
Cisco v. *Roberts*, 36 New York 292 22
Clyde Mallory Lines v. *State of Alabama*, 56 Sup. Ct. Rprts. 194 ..... 12, 21, 27, 28, 29
Commonwealth v. *Breakwater Co.*, 100 N. E. 1034, 214 Mass. 10 23
Cooley v. *Bd. of Port Wardens*, 12 Howard 249 ..... 12, 27, 31
Cornell Steamboat Co. v. *Sohmer*, 235 U. S. 549 26
County of Mobile v. *Kimball*, 102 U. S. 691 21
Crossman v. *Lurman*, 192 U. S. 189 25
Gibbons v. *Ogden*, 9 Wheat. 1, 6 Law. Ed. 23 ..... 19, 21, 26, 29, 31
Gilman v. *Philadelphia*, 70 U. S. 713 ..... 26, 29
Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S. 196 ..... 22, 28
Hartford Accident & Indemnity Co. v. *People of the State of Ill., ex rel., McLaughlin*, Vol. 56, Sup. Ct. Rprts. 685 (Advance Sheets) 26
Hennington v. *Georgia*, 163 U. S. 299 ..... 25, 29, 31
Leisy v. *Hardin*, 135 U. S. 100 29
Long v. *Rockwood*, 277 U. S. 142 16
Minnesota Rate Cases, 230 U. S. 352 ..... 27, 29, 32

Page

Missouri, Kansas & Texas Ry. Co. v. *Haber,* 169 U. S. 613 25
Missouri Pacific Ry. v. *Larabee Flour Mills,* 211 U. S. 612 27
Morgan's Steamship Co. v. *Louisiana Bd. of Health,* 118 U. S. 455 ..... 21, 26, 28
Nashville, Chattanooga & St. Louis Ry. Co. v. *Alabama,* 128 U. S. 96 29
New York, New Haven, Hartford Rr. Co. v. *New York,* 165 U. S. 628 31
Old Dominion Steamship Co. v. *Gilmore,* 207 U. S. 398 21
Packet v. *Catlettsburg,* 105 U. S. 559 ..... 27, 28
Pacific States Box & Basket Co. v. *White,* 56 Sup. Ct. Rprts. 159 26
Pennsylvania Rr. Co. v. *Hughes,* 191 U. S. 477 25
Pittsburgh & Southern Coal Co. v. *Louisiana,* 156 U. S. 590 28
Red Cross Lines v. *Atlantic Fruit Co.,* 264 U. S. 109 16
Reid v. *Colorado,* 187 U. S. 137 25
Ringler v. *Laing,* 21 F. (2d) 794 21
Savage v. *Jones,* 225 U. S. 501 (p. 533) 11
Sherlock v. *Alling,* 93 U. S. 100 ..... 22, 27, 29
Smith v. *Alabama,* 124 U. S. 465 29
State v. *Dodge,* 104 Atl. Rep. 5 21
State v. *Ames,* 47 Wash. 328 27
Steamboat N. W. v. *Rea,* 59 U. S. 223 ..... 21, 26, 29
Stewart & Co. v. *Rivara,* 274 U. S. 614 27
Transportation Co. v. *Parkersburg,* 107 U. S. 691 28
The License Cases, 46 U. S. 627 ..... 21, 27, 29, 31
The Winnebago, 205 U. S. 354 21
United Dredging Co. v. *City of Los Angeles,* 10 F. (2d) 239—Affirmed 14 F. (2d) 366 21
Vandaliah Rr. Co. v. *Public Serv. Comm. of Indiana,* 242 U. S. 255 27
Virginia v. *Imperial Coal Sales Co.,* 293 U. S. 15 16
William Cushing et al. v. *Owners of Ship John Frazier,* 62 U. S. 184 ..... 21, 27
Wilmington Trans. Co. v. *Railroad Commission of Calif.,* 236 U. S. 151 21

Table of Statutes Cited.

	Page
Laws of the State of Washington of 1907, Chap. 200 (R. R. S.) (Sec. 9843 to 9870, Inc.)	33, 44
Sec. 362, U. S. C. A., R. S., Sec. 4400; Aug. 7, 1882, c. 441, Sec. 1, 22 Stat. 346	6, 22
Sec. 364, U. S. C. A., R. S., Sec. 4401, Title 46—Shipping	6
Sec. 391, U. S. C. A., R. S., Sec. 4417; Dec. 21, 1898, c. 29, Sec. 4, 30 Stat. 765, Title 46—Shipping	6, 22
Sec. 392, U. S. C. A., R. S., Sec. 4418; June 19, 1886, c. 421, Sec. 14, 24 Stat. 82	6, 22
Sec. 404, U. S. C. A., R. S., Sec. 4426; Dec. 22, 1890, c. 26, 26 Stat. 692, Title 46—Shipping	6
Sec. 405, U. S. C. A., R. S., Sec. 4427; Title 46—Shipping	6, 23
Sec. 511, U. S. C. A., R. S., Title 46—Shipping; June 9, 1910, c. 268, Sec. 1, 36 Stat. 462	6
Load Line Act, United States Statutes at Large, Approved Mar. 2, 1929, Vol. 45, page 1492	7
Sec. 344, U. S. C. A.—Title 28—Sec. 237 Subdiv. "B" of the Judicial Code	10, 16
Chap. 200—Washington Laws of 1907; Sec. 26, p. 438	12, 28
Chap. 200—Washington Laws of 1907; Sec. 2, p. 425	22, 24
Chap. 200—Washington Laws of 1907; Sec. 3, p. 426	22, 24
Chap. 200—Washington Laws of 1907; Sec. 4, p. 427	24
Sec. 399, U. S. C. A., R. S., Sec. 4421; Feb. 27, 1877; c. 69, Sec. 1, 19 Stat. 251, Title 46—Shipping	24
Revised Statutes Sec. 4438—Title 52—Regulation of Steam Vessels	30
Revised Statutes Sec. 4463—Title 63	30

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 552

E. PAT KELLY, as Director of the Department of Labor and Industries of the State of Washington; JAY OLINGER, as Supervisor of the Safety Division of Said Department, and HOWELL PARKER, as Deputy of Said Director under the Title, Marine Inspector,

Petitioners,

vs.

STATE OF WASHINGTON on the Relation of FOSS COMPANY, INC., a Corporation; ALLMAN-HUBBLE TUGBOAT COMPANY, INC., a Corporation; BELLINGHAM TUG & BARGE CO., INC., a Corporation; CAPITAL CITY TUG BOAT CO., INC., a Corporation; CROSBY SAND & GRAVEL COMPANY, INC., a Corporation; JAMES DRAHAM, FOSS LAUNCH & TUG CO., INC., a Corporation; O. D. HOUCHAN, JOHNSON TUG & BARGE COMPANY, INC., a Corporation; JOHN W. and ALLEN McEWAN, Doing Business as McEwan Brothers; MERRILL & RING LUMBER CO., INC., a Corporation; NEMAH RIVER TOWBOAT COMPANY, INC., a Corporation; NORTHWESTERN LOGGING COMPANY, a Corporation; JOHN OLSON and ED. M. OLSON, Doing Business as Olson Tugboat Company; OLYMPIA TOWING COMPANY, INC., a Corporation;

PIONEER TOWING CO., INC., A CORPORATION; PIONEER TRANSPORT COMPANY, A CORPORATION; PUGET SOUND TUG & BARGE CO., INC., A CORPORATION; SCHAFER BROS. LUMBER & SHINGLE COMPANY, A CORPORATION; SHIVELY TOW BOAT COMPANY, INC., A CORPORATION; DELTA V. SMITH, SUNSET TUG & BARGE CO., A CORPORATION; TACOMA TUG & BARGE CO., INC., A CORPORATION; FRED W. THURBER, TRANSIT TOWBOAT COMPANY, INC., A CORPORATION; R. J. ULTICAN TUGBOAT CO., INC., A CORPORATION; WAGNER TUG BOAT COMPANY, A CORPORATION; CLIFFORD W. WATERMAN, DOING BUSINESS AS WATERMAN TOWING CO.; KNAPPTON TOWBOAT CO., A CORPORATION, AND SHAVER TRANSPORT CO., A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

That they were made defendants in an action instituted by the plaintiffs who are the owners of tugboats which operate mainly upon the inland waters of the State of Washington, in an action which sought to prohibit your petitioners from enforcing Chap. 200 of the Laws of 1907 of the State of Washington. (See Apendix "A", p. 33.) The Superior Court for Thurston County dismissed the petition for a writ of prohibition and thereafter appeal was

taken to the Supreme Court of the State of Washington by the plaintiffs in the trial court. The Supreme Court of the State of Washington reversed the judgment of the Superior Court for Thurston County and entered judgment remitting the cause to the lower court with instructions to grant the writ of prohibition.

The State Supreme Court was divided, the majority consisting of five of the Supreme Court justices holding that the State statute, the enforcement of which was being sought to be prohibited by the plaintiffs in the lower court, was invalid. Four justices of the Supreme Court dissented, stating that the decision of the lower court should have been affirmed.

I.

Summary Statement of the Matter Involved.

Chapter 200 of the laws of Washington of 1907 promulgates a comprehensive code for the inspection of every steam boat or other vessel operated by machinery, engaged in carrying passengers for hire or towing for hire, *except vessels which are subject to inspection under the laws of the United States.** This Act also provides, amongst other things, for the licensing of officers employed to operate the boats which fall under the contemplation of the provisions of the Act and likewise vests authority in the Department of Labor and Industries, through its officers, to require adequate personnel to safely operate the vessels which fall within the purview of the provisions of this law.

The thirty-one plaintiffs are owners of one hundred seventy-two tugboats which mainly travel upon the inland waters of the State of Washington, including Puget Sound, Grays Harbor and the Columbia River. Occasionally these

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* Italics herein are used throughout by us for emphasis and do not appear in text.

boats do sail into Canadian waters and likewise travel outside of the inland waters of the State of Washington upon the high seas (R. 34, 41).

One hundred thirty-nine of these vessels are operated by some form or other of internal combustion engines, the remainder are operated by steam (R. 34). The controversy in this action centers about the question of the authority of the State of Washington to enforce, through the Department of Labor and Industries, the provisions of Chap. 200 of the Laws of 1907 with reference to these one hundred thirty-nine boats. Plaintiffs in the Superior Court for Thurston County brought suit asking for a writ of prohibition and in said petition for said writ of prohibition alleged, among other things, that the Director of the Department of Labor and Industries, through his subordinates, was about to institute suit for penalties against these plaintiffs and all other vessel owners who were navigating their vessels, which were not subject to inspection by the United States Steamboat Inspectors, in or upon any waters lying within the boundaries of the State of Washington unless they, among other things,

(a) Submitted their vessels annually, or oftener, for inspection by the duly constituted officers;

(b) Made changes and improvements as required by the Director;

(c) Carried such officers on said vessels as the Director had licensed as masters, pilots and engineers after examination;

(d) Carried such crews as required by the Director to manage each vessel with safety (R. 16, 17, 18).

And plaintiff further alleged that the Director was about to prosecute the plaintiffs for failing to comply with all of the remaining provisions of Chap. 200 of the Laws of 1907.

Plaintiffs alleged in their petition for writ of prohibition, that the acts contemplated to be done by the Director constituted a violation of Sec. 8, Art. 1 of the Constitution of the United States (see p. 22 of the record), and also stated that Chap. 200 of the Laws of 1907 was in direct conflict with the laws of the United States, which provided for inspection and boarding of the said vessels by officers and inspectors of the Board of Navigation and Steamboat Inspection Service and by all Coast Guard officers (R. 22).

The plaintiffs further alleged in the said petition for writ of prohibition that if your petitioners, defendants in the trial before the lower court, were not prohibited from enforcing provisions of Chap. 200 of the Laws of 1907 that they would be deprived of their property without due process of law and would further be deprived of equal protection of the laws within the intent and meaning of the 14th Amendment to the Constitution of the United States (R. 22).

Your petitioners, defendants below, in the action in the Superior Court for Thurston County of the State of Washington interposed a demurrer to the complaint, the trial judge reserved decision on the demurrer and set the matter down for trial upon merits (R. 26).

Thereafter, your petitioners, defendants in the trial court, answered the complaint, alleging in defense that the acts contemplated to be done by them constituted a valid exercise of authority under the provisions of the law in question (R. 27). At the trial the defendants called the officers of the United States Customs Department and the Deputy in charge of the Marine Division of the Federal goverment for the Puget Sound area, who testified as to their duties under the Federal statutes (R. 69-105 Inc.).

The thirty-one appellants in the State Supreme Court and the respondents here are owners of one hundred seventy-two tugboats, thirty-three of these boats are steam vessels,

one hundred thirty-nine are propelled by internal combustion engines and are not steamboats. The issue in this case centers upon the validity of the provisions of Chap. 200 of the Laws of 1907 as applied to these boats which are not in the steamboat category.

It was conceded by all parties to this action that the acts sought to be prohibited have not been attempted to be committed in connection with steamboats which are subject to the jurisdiction of the Federal Government (R. 15-16, 121-122, 123). The boats in question are engaged exclusively in the business of towing (R. 34). The largest part of the towing done by these vessels is purely intra-state work but substantially all of them are capable of doing coastwise service and in some instances do so (R. 41, 42). None of these vessels which we shall hereafter designate for our purpose as motor tugboats, are inspected by the United States Inspectors of Steamboats for the district or districts within which these boats operate (R. 46, 51-52, 71, 72, 73, 77, 81, 86, 87, 88, 89, 92, 101).

It was conceded by the appellants in the State Supreme Court and the respondents here, that, at the time of trial in the lower court, they had interpreted the Federal statutes relating to inspection of vessels, and particularly Sections 362, 364, 391, 392, 404, 405 and 511, Title 46 of U. S. C. A., set out in Appendix "B", to vest no authority in the inspectors of Steamboats to exercise their authority over the motor tugs here in question (R. 46, 47, 78), for the purposes of determining the fitness of the mechanical equipment, engines, boilers, pressure tanks and all other machinery used in the propulsion of the vessel and it was likewise conceded that the United States Inspectors of Hulls and Boilers, who are under the jurisdiction of the United States Department of Commerce, have not the authority to inspect the boats in question under the United States Steamboat Inspection laws (R. 52).

It was further conceded that the United States Coast Guard Service made no attempt to inspect these vessels, sought to be inspected and regulated by your petitioners under the statute here in question, for the purposes of determining the seaworthiness of the hulls of the vessels and the fitness of the mechanical equipment with relation to the safety with which said equipment might be used by the crew (R. 48, 52—See also Dept's Exhibit 5).

These vessels are subject to no regular inspection service of the Federal government to determine the seaworthiness of the vessel, the fitness of its physical structure and the state of physical repair or disrepair of its propelling machinery (R. 54, 55). Likewise there is no Federal agency which exercises any supervision or control over the number of persons who may be transported on these boats or number of men who shall constitute the minimum number required to operate the boat with safety (R. 55, 81-82). There is no authority in the Federal government to require that these boats be operated by licensed officers or that there be any officers in charge of the navigation of these vessels (R. 55, 96).

The Coast Guard of the United States government does, however, board these vessels for the purposes of determining whether they are complying with the general laws relative to navigation which deal with lights, fog horns, whistles, life preservers and fire extinguishers and that they further do investigate to corroborate the names and official numbers of these vessels (R. 61-62).

The American Bureau of Shipping, under the Load Line Act and Load Line Treaty of 1930, through the American Inspection Society does inspect motor vessels for seaworthiness, which are over one hundred fifty tons gross, which depart on a foreign voyage outside of the sheltered area (R. 70). Of the vessels herein involved there are but three

motor tugs which exceed one hundred fifty tons gross (R. 70). The Federal Government, through the Customs Service, does measure these vessels at the time of their construction in order to have the correct measurements for the purposes of classification in connection with registration or enrollment (R. 71). But this investigation has not for its purpose the determination of the seaworthiness of the hull or machinery of any of these respective vessels (R. 72).

There is no Federal law which requires motor tugs to carry life boats (R. 72). The Federal Government does not have the power to require licensed officers on tugboats (R. 78). The Inspector of Hulls of the Bureau of Navigation of the Steamboat Inspection Service of the Department of Commerce is required to examine motor-tugs such as the vessels with which we are concerned in this action, at such time as the said vessel may change its name, but this examination is made solely for the determination of the name and tonnage and said examination is not concerned with the seaworthiness of the hull or fitness of equipment or with the question of whether or not the boat may be operated with safety (R. 81-82).

There are many land-locked lakes in the State of Washington upon which steamboats and other vessels ply. The jurisdiction of the State of Washington, with reference to these boats, is not in question in this suit. Some of the provisions of Chap. 200 of the Laws of 1907 refer specifically and exclusively to said land-locked waters which are under the jurisdiction of the State and do not fall within the jurisdiction of the United States. (See Sec. 8, p. 429, Chap. 200 of the Laws of 1907, set out in Appendix "A" at p. 36.) Also designated as Sec. 9850 of Remington's Revised Statutes of the State of Washington.

Chapter 200 of the Laws of 1907 was meant to apply to all vessels operating upon the land-locked waters of the State of Washington and was also intended to apply to all boats navigating on the waters within the jurisdiction of the United States, *which are not subject to inspection under the laws of the United States.* To a large extent the quintessence of the subject matter of the legal dispute in this case revolves about the question of the application of many of the provisions contained in Chap. 200 of the Laws of 1907 which obviously, if applied to Federal jurisdiction, would be in conflict with Federal legislation, such as provisions dealing with rules for navigation, sections dealing with ferry boats and likewise which have been provided for by Federal enactment on navigable waters under the jurisdiction of the Federal Government.

The provisions contained in these various sections, however, can be given full force and complete efficacy when applied exclusively to the land-locked waters of the State of Washington. Beyond this the final essence of the legal controversy finds itself expressed in the question as to whether or not the Federal Government has completely occupied the field for regulation with reference to these vessels by virtue of having vested the authority in the Coast Guard Service to do the certain limited and specified acts which have heretofore been described.

Counsel for the appellants in the State Supreme Court and respondents here contends that Chap. 200 of the Laws of 1907 is invalid because the Federal Government has already completely occupied the field so as to leave the State no sphere within which its laws may function without conflict with the provisions of the Federal statutes by virtue of which, the powers above described, were vested in the officers of the Coast Guard Service and the Steamboat Inspection Service of the Federal Government.

Before the trial court and in his opening brief, counsel for the appellants in the State Supreme Court argued that Chap. 200 of the Laws of 1907 was intended to apply solely to the land-locked waters of the State of Washington. This position he abandoned in his reply brief (see Reply Brief certified in the record, p. 152), at which point counsel conceded that it was the legislative intention that the statute in question was intended to apply generally to all the navigable water of the State of Washington excepting wherein it was specifically provided that the provisions of the statute were to apply only to the land-locked waters of the State. Counsel further contended in argument both before the Trial Court and the State Supreme Court, that the statute in question constituted interference with the uniformity of the Maritime Law and that said provisions of said statute also constituted a burden upon interstate commerce. There are some four hundred thousand motor boats upon the navigable waters of the nation which are subject to the same limited governmental supervision as the boats to which the provisions of Chap. 200 of the Laws of 1907 have been sought to be applied by the authorities of the State of Washington (R. 125).

II.

Reasons Relied on for the Allowance of the Writ.

Under Sec. 237 "B" of the Judicial Code (U. S. C. A., Title 28, Sec. 344) the judgment of a state Supreme Court holding a state statute invalid because of its repugnancy to the Constitution or laws of the United States may be reviewed by the Supreme Court of the United States by certiorari.

Subdivision 5 (a) of Rule 38 of the Rules of the Supreme Court of the United States states that, "Where a State Court in deciding a Federal question of substance not here-

tofore determined by this Court or has decided it in a way probably not in accordance with the applicable decisions of this Court, a review of the question by a writ of certiorari to the State Supreme Court will be granted."

In its decision in the instant case, the Supreme Court of the State of Washington committed several errors which are reviewable by the United States Supreme Court under and by virtue of provisions of the above cited statute and rule. For the following reasons the writ of certiorari should issue:

(1) The Washington State Supreme Court committed error in holding that because Congress had legislated with respect to vessels and navigation in navigable waters to such an extent as to seemingly cover every situation and condition which Congress has considered to be necessary or advisable to cover, that, therefore, Chap. 200 of the Laws of 1907, which provided for inspection and regulation of vessels not subject to inspection by the Federal Government was invalid for the reason that Congress had intended that these vessels remain unregulated.

In so holding, the Washington State Supreme Court refused to follow the decisions of the United States Supreme Court in the case of *Savage* v. *Jones*, reported at 225, U. S. 501, and the case of *Atchison Railway* v. *The Railway Comm.*, 283 U. S. 380, and a vast multitude of cases cited and discussed in those decisions which hold that Congress may circumscribe its regulations and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the Federal legislation is not to be implied unless the act of Congress, fairly interpreted, is in conflict with the State law. The Washington State Supreme Court, noted in its decision that vessels in question are not subject to inspection for seaworthiness nor was there a requirement for examination

and licensing of officers, yet it implied from the absence of legislation that it was the Congressional intention that these vessels should not be regulated. In so doing the Court committed error by refusing to follow the United States decisions, above cited, which require a repugnancy or conflict between the State statute and the Federal statute in order that the State statute shall be held to be invalid.

(2) The State Supreme Court committed error in holding that the jurisdiction of the Federal Government with relation to navigation and commerce is exclusive and that the State may not legislate upon matters of local concern even when the Federal Government has not acted excepting only in the case of pilots and pilotage.

This holding is contrary to the decisions of the Supreme Court of the United States which has uniformly held, beginning with the case of *Cooley* v. *The Board of Port Wardens of Philadelphia,* 12 Howard 299, that the State has the sovereign power to enact legislation affecting navigation and commerce in matters of local concern where the Federal Government has not preempted the field by legislating upon the same subjects.

(3) The Supreme Court of the State of Washington erred in holding that the fee provided for in Sec. 26 of the Laws of 1907, p. 438, (Appendix "A" p. 42) to be paid by the owner or master of each vessel for the inspection of said vessel constituted a license fee which was an unlawful tax upon interstate commerce.

This holding is directly contrary to the holding in the case of *Clyde Mallory Lines* v. *The State of Alabama,* 56 Sup. Ct. Rep. 194.

(4) The Supreme Court of the State of Washington erred in holding that the regulations provided for by Chap.

200 of the Laws of 1907 constituted a burden upon navigation and interstate commerce. This holding is contrary to United States Supreme Court decisions in the cases above cited.

(5) The Supreme Court of the State of Washington erred in holding that the acts sought to be done by the petitioners in this case and which are sought to be prohibited by the action of the plaintiffs in the trial court and the appellants in the Supreme Court of the State of Washington and the respondents herein have a tendency to interfere with the uniformity of the Maritime Law, see *Clyde Mallory Lines* v. *Alabama, supra.*

(6) The Supreme Court of the State of Washington erred in holding that Chap. 200 of the Laws of 1907 is invalid if applied to the navigable waters of which the Federal Government has control.

WHEREFORE your petitioners pray that a writ of certiorari issue under the seal of this Honorable Court directed to the Supreme Court of the State of Washington directing that court to certify and send to this Court, for its review and determination on a set day to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket; No. 26052, State of Washington On The Relation of Foss Company, Inc., a corporation, *et al.*, appellants, *vs.* E. Pat Kelly, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of the Safety Division of said Department and Howell Parker as Deputy of said Director under the title, Marine Inspector, respondents, to the end that this cause may be reviewed by this Court as provided by the statutes of the United States and that the judgment herein in the State Supreme Court

be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated November 4, 1936.

G. W. HAMILTON, *Attorney General of the State of Washington;*
W. A. TONER, *Assistant Attorney General of the State of Washington;*
DANIEL BAKER,
Of Counsel,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 552

E. PAT KELLY AS DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON; JAY OLINGER, AS SUPERVISOR OF THE SAFETY DIVISION OF SAID DEPARTMENT, AND HOWELL PARKER, AS DEPUTY OF SAID DIRECTOR UNDER THE TITLE, MARINE INSPECTOR,

Petitioners,

vs.

STATE OF WASHINGTON ON THE RELATION OF FOSS COMPANY, INC., A CORPORATION, ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion of the Washington State Supreme Court is reported in Advance Sheets, 86 Washington Decisions, at page 519, and is likewise set out in the record accompanying the petition at pages 140-146, dissenting opinion (R. 146-150).

Petition for rehearing was filed on the 4th day of August, 1936, within the time fixed by the rules of said court and was denied on September 3, 1936.

II.

Jurisdiction.

(1) The statutory provision which sustains the jurisdiction of this Court is found in Sec. 237, Subdiv. "B" of the Judicial Code (U. S. C. A. Title 28, Sec. 344).

(2) Since we have already set forth in the petition for writ of certiorari reasons upon which we rely for the allowance of the writ, see pages 8, 9 herein, in the interests of brevity said reasons will not be restated here. The cases believed to sustain the said jurisdiction are as follows:

Blodgett v. *Silberman,* 277 U. S. 1;
Long v. *Rockwood,* 277 U. S. 142;
Virginia v. *Imperial Coal Sales Co.,* 293 U. S. 15;
Red Cross Lines v. *Atlantic Fruit Co.,* 264 U. S. 109.

In the cases above cited, state statutes held to be invalid as violative of the Federal Constitution were reviewed by certiorari by this Honorable Court.

III.

Statement of the Case.

The proceedings and subject matter of this cause from its inception until judgment was rendered by the State Supreme Court have been already related in the preceding petition for writ of certiorari (pp. 3-10), and in the interests of brevity we hereby adopt the same and incorporate it as a part of this brief without re-statement.

IV.

Specification of Errors.

(1) The Supreme Court of the State of Washington erred in reversing the judgment of the Superior Court of the State of Washington dismissing the petition for a writ of prohibition.

(2) The Supreme Court of the State of Washington erred in holding that Congress had legislated so completely with reference to all vessels plying the navigable waters of the State of Washington so as to have fully occupied the sphere within which legislation pertaining to said vessels could be enacted and in consequence thereof, Chap. 200 of the Laws of 1907 was invalid as applied to navigable waters over which the Federal Government has jurisdiction.

(3) The Supreme Court of the State of Washington erred in holding that the State of Washington did not have general concurrent power to legislate upon matters pertaining to navigation and commerce of intrinsically local concern upon which the Federal Government had not legislated, the said State court holding the authority of the United States Government, under Art. 1, Sec. 8 of the Federal Constitution, to be exclusive in all matters relating to navigation and commerce irrespective of whether they were of local or national concern, excepting, in the matter of pilotage which constituted an exception wherein the State could legislate in the absence of Congressional enactments.

(4) The Supreme Court of the State of Washington erred in holding that in matters primarily of local concern, silence of Congress in relation to matters affecting in some degree navigation and commerce was to be construed to be

an implication that Congress considered that those matters which had not been made subject to Federal regulation were to be left unlegislated upon and that in consequence thereof, Chap. 200 of the Laws of 1907, the provisions of which were directed to regulation of those matters of local concern which had not been brought within the scope of Federal supervision and control by Congress, was invalid, even though there existed no conflict between the provisions of the State statute and the Federal laws in this field.

(5) The Supreme Court of the State of Washington erred in holding that the provisions of Chap. 200 of the Laws of 1907 constituted an unlawful tax upon interstate commerce.

(6) The Supreme Court of the State of Washington erred in holding that the provisions of Chap. 200 of the Laws of 1907 constituted an unlawful burden upon interstate commerce.

(7) The Supreme Court of the State of Washington erred in holding that the provisions of Chap. 200 of the Laws of 1907 interfered with the uniformity of Maritime Law.

V.

ARGUMENT.

Summary of the Argument.

Although specification of errors numbered two and four constitute two distinct and separate erroneous holdings by the Washington State Supreme Court, they are so closely interwoven and error four flows so inevitably as a consequence of error two that they have been treated together under Point "A" in the Argument. Specification of error one is merely the conclusion which is drawn from the compilation of the specified errors and constitutes said error as a result of the accumulated errors enumerated. Therefore,

no argument on this point is required since the soundness of that allegation of error must stand or fall upon the validity of the arguments directed to the other errors.

Point A. Since the record indisputably reveals that the vessels in question are not subject to inspection by the Federal Government for many purposes of substantial importance with relation to the safety of crew and the people in transit upon the inland waters of the State, under the authority of the case of *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 Law. Ed. 23, the provisions of the State statute which are directed toward regulating matters of local concern must be held to be valid in the absence of Congressional legislation as it is well established that Congress may circumscribe its regulation and occupy a limited field and the intention to supersede the exercise by the State of its authority as to matters not covered by the Federal legislation is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the State. Silence on the part of Congress is not to be interpreted as a prohibition against the State to legislate concerning matters of local interest.

Point B. It has been well settled ever since the case of *Cooley* v. *Board of Port Wardens,* reported in 53 U. S. 298, that the State has concurrent power to regulate generally all matters affecting navigation and commerce in the absence of Federal legislation when the object of the legislation is to govern and control matters of peculiarly local concern.

Point C. The rule is well settled that where fees have been provided to be collected for inspections relating to matters of local concern and which are being regulated under the rule that the State may legislate upon matters of local concern affecting navigation and commerce where Congress has remained silent, that the collection of said fees does not constitute an unlawful tax upon interstate commerce.

Point D. It has been unwaveringly held by this Court that the State has the power to legislate upon matters of local concern where the health and safety of its citizens are involved, in those instances where the Federal Government has not legislated and that even though interstate commerce and navigation is, to some degree, affected, that the State statute is not invalid solely by reason thereof.

Point E. There is no uniform provision of Maritime Law relating to harbor traffic in the several ports of the United States. The matter of regulating harbor traffic with respect to the safety of said traffic in the said harbors is a matter which is peculiarily local in character and in no way interferes with the characteristic uniformity of Maritime Law. The duty of regulating said harbor traffic has been delegated within the circumscribed limits wherein the Federal Government has acted to local inspectors in the several districts.

POINT A.

The Federal Government has not completely occupied the sphere of regulation within which Chapter 200 of the Laws of 1907 is applicable and, therefore, said statute cannot be held to be invalid by the implication of silence unless there is a direct conflict between its terms and the provisions of the Federal Law applicable to this field.

The operation of the tugboats here in question is largely confined to inland waters of the State of Washington (R. 41, 42). The safety with which these vessels are operated, both as to the crew of these respective vessels and to the citizenry of the State of Washington which is in constant flow of travel upon said inland waters, is a matter of immediate and local concern which demands, in the interests of the population of the state generally, regulation of these vessels which are continuously and constantly traversing

its inland waters so that the life, health, peace and property of its citizenry be protected. See:

Steamboat New York v. *Rea*, 59 U. S. 23;
Gibbons v. *Ogden*, 9 Wheat. 1, 6 Law. Ed. 23;
Cooley v. *Bd. of Port Wardens*, 53 U. S. 298;
County of Mobile v. *Kimball*, 102 U. S. 61;
Morgan v. *Louisiana*, 118 U. S. 455;
Wilmington Trans. Co. v. *Cal. Railroad Commission*, 236 U. S. 151;
Ringler v. *Long*, 21 Fed. 2nd 795;
United Dredging Co. v. *City of Los Angeles*, 10 Fed. 2nd 239; Affirmed 14 Fed. 2nd 366;
Chicago, Rock Island & Pacific Rr. v. *Arkansas*, 219 U. S. 453;
Clyde Mallory Lines v. *State of Alabama*, 56 U. S. Sup. Ct. Reptr. 194;
State v. *Dodge*, 104 Atl. Rprts. 5;
Wm. Cushing, et al., v. *Owners of Ship John Frazier, et al.*, 62 U. S. 184;
The Winnebago, 205 U. S. 354;
Old Dominion S. S. Co. v. *Gilmore*, 207 U. S. 398.

"As a general rule, the power of a state over all matters not granted away must be as full in the bays, ports and harbours within her territory, *intra fauces terrae*, as on wharves and shores, or interior soil. And there can be little check on such legislation, beyond the discretion of each State, if we consider the great conservative reserved powers of the states, in their quarantine or health systems, in the regulation of their internal commerce, in their authority over taxation, and, in short every local measure necessary to protect themselves against persons or things dangerous to their peace and their morals."—The License Cases, 46 U. S. 627.

See also:

Sherlock v. *Alling,* 93 U. S. 100;
Cisco v. *Roberts,* 36 N. Y. 292;
Gloucester Ferry Co. v. *Pennsylvania,* 114 U. S. 214;
Burrows v. *Delta Trans. Co.,* 64 N. W. 501 (Supreme Court of the State of Michigan.)

Section Two of Chap. 200 of the Laws of 1907, page 425 (See p. 33 Appendix "A" herein) provides as follows:

> "*Inspection of vessels—Investigation of accidents.*—The commissioner of labor shall annually, or oftener if he has good cause to believe it reasonable, inspect or cause to be inspected, every steam vessel or other vessel operated by machinery engaged in carrying passengers for hire or towing for hire, *except vessels which are subject to inspection under the laws of the United States,* examine carefully her hull, boats and other equipment, examine her engine and boilers, ascertain how long it will be safe to use the same, * * *. (Sec. 9844 Remington's Revised Statutes of the State of Washington.)"

The duties imposed upon the labor commissioner under Chap. 200 of the Laws of 1907 devolved upon the director of Labor and Industries by virtue of the laws of the State of Washington of 1921, Sec. 80, page 43.

Section 3 of Chap. 200 of the Laws of 1907 provides for the inspection of boilers and closely follows the provisions of the Federal Act pertaining to steamboats. See Sec. 392, of U. S. C. A., Title 46, Shipping. Sec. 4418, Revised Statutes, set out in full in the Appendix "B', at page 47.

Section 2 of said statute hereinbefore referred to provides for annual inspection and follows generally the provisions of Section 391 U. S. C. A. Title 46, Shipping. (See Appendix "B", page 46.)

It is conceded by all parties to this action (R. 46) that these vessels are not subject to the annual inspection provided for in the above referred to sections of the Federal law. It is further conceded that Sec. 405 of U. S. C. A. Title 46, Shipping, Revised Statutes 4427 (See Appendix "B" page 49), has no application to motor tugboats herein. See also; *Commonwealth* v. *Breakwater Co.*, 100 N. E. 1034, 214 Mass. 10. There is no provision in the Federal statutes for inspection of these vessels for seaworthiness of structure of the vessel itself nor for the mechanical fitness of the propelling machinery (R. 47).

There is no provision in the Federal law which requires licensing of the officers in command of these motor tugs. No provision is made by Federal law as to the number of men which shall comprise the crew in order to insure safe operation of said boats. No Federal agency makes periodic, thorough, comprehensive inspections of these vessels nor is there any certificate issued by any Federal agency to show that these vessels have been inspected for the purposes of determining the fitness of the structure of the boat generally with reference to the safety with which it may be operated.

The Coast Guard Service of the Department of Commerce has some limited functions to perform with respect to these motor tugs as well as all other vessels. It is conceded that the Coast Guard does not make the inspections provided for by the Sections of the Washington State statute hereinbefore referred to nor do they issue certificates such as provided in Sec. 4 of Chap. 200 of the Laws of 1907, nor do they have authority to provide for licensed officers and to set the number of men to constitute a crew necessary to manage the vessel with safety. (R. 46, 48—also Defendant's Exhibit 5 which is a letter from Capt. R. W. Dempwolf of the United States Coast Guard Service, Commander of the Seattle division.)

Obviously space would not permit a detailed recitation of the volumes of rules, regulations and statutes devoted to the subject of shipping and sailors.

Counsel for the appellant in the Supreme Court of the State of Washington argued that since the said motor tugboats were subject to being boarded by the Coast Guard that this cursory inspection constituted an inspection under the laws of the United States and, therefore, the State statute herein could not be operative upon these vessels. The fallacy of this argument is clearly revealed from an examination of the respective sections of the Federal and State laws.

The inspection required by Sec. 2 of Chap. 200 of the Laws of 1907 is obviously the same type of inspection as set out in the provisions 362, 391, 392 and also 399 of the U. S. C. A. This is plainly apparent when the substance of those sections is compared with that of Sections 2, 3, and 4 of Chap. 200 of the Laws of 1907. The inspection intended by section 2 of said Act did not contemplate the circumscribed and routine police inspection of lights and superficial equipment made by the Coast Guard Service above decks but contemplated rather a rigid, periodical, thorough going over from stem to stern and from deck to hold.

The error of the Supreme Court of the State of Washington in holding that the Federal Government had completely legislated in this field so as to render invalid the provisions of Chap. 200 of the laws of 1907 is so patent and so salient as to require no further dissertation.

The State statute expressly limits the application of its provisions to vessels not subject to inspection by the Federal law, therefore there can be no conflict between the State law and the Federal law express or implied.

That the State has the undoubted power to regulate in this field in the absence of Federal legislation has already been pointed out hereinbefore. In the case of *Savage* v. *Jones, supra,* the United States Supreme Court, at page 533, said:

> "But the intent to supersede the exercise by the State of its police power as to matters not covered by Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state."

This principle has abundant illustration, see *Reid* v. *Colorado,* 187 U. S. 137; *Atchison Railway* v. *Railroad Commission,* 283 U. S. 380; *Hennington* v. *Georgia,* 234 U. S. 280; *Chicago, Milwaukee, St. Paul Railway Co.* v. *Solan,* 169 U. S. 133; *Missouri, Kansas & Texas Railway Co.* v. *Haber,* 169 U. S. 613; also *Pennsylvania Railroad Co.* v. *Hughes,* 191 U. S. 477, *Crossman* v. *Lurman,* 192 U. S. 189 and *Asbell* v. *Kansas,* 209 U. S. 251.

It is submitted that in determining the question of conflict between the provisions of the State and Federal statutes in this sphere for regulation that the Washington State Supreme Court decided a question involving Federal statutes and failed to follow the rule of law established by the United States Supreme Court for determining when a State statute is rendered invalid by reason of transgression against Federal legislation.

In this case the State of Washington found that the failure of Congress to provide regulation for the vessels in question constituted a manifesto by Congress that this field was to be left uncontrolled. This holding is directly in

conflict with the Supreme Court decisions above cited. See also:

Hartford Accident and Indemnity Co. v. *People of the State of Illinois ex rel. McLaughlin, Director of Agriculture,* Reported in Vol. 56 of Advance Sheets of the Sup. Ct. Rprtr. at page 685;

Pacific States Box & Basket Co. v. *White,* 56 Sup. Ct. Rep. 159 (Advance Sheets).

POINT B.

The State has Concurrent jurisdiction with the Federal Government to regulate navigation and commerce in matters primarily of local concern, in the absence of Federal Legislation covering the same subject matter.

The power of the State to exercise supervision and control over navigable waters and the vessels plying thereon, within its jurisdiction, when the regulation is directed to matters primarily of local concern, was established in the case of *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L. Ed. 23.

Chief Justice Marshall observed that this power had its origin in the police power which resided in all sovereignties to regulate in matters concerning the peace, safety, health and morals of its citizens.

In the case of *Cooley* v. *Board of Wardens of the Port of Philadelphia, supra,* it was determined that this power stemmed from the authority of the State to legislate on matters of navigation and commerce and did not solely originate in the police power of the sovereign. The rule laid down in these cases has never been departed from. See:

Steamboat New York v. *Rea,* 59 U. S. 223;
Gilman v. *Philadelphia,* 70 U. S. 713;
Cornell Steamboat Co. v. *Sohmer,* 235 U. S. 549;
Morgan v. *Louisiana,* 118 U. S. 455;

Packet v. *Catlettsburg*, 105 U. S. 559;
Sherlock v. *Alling*, 93 U. S. 100;
Vandalia Railroad Co. v. *Public Serv. Comm. of Indiana*, 242 U. S. 255;
The License Cases, 46 U. S. 627;
Minnesota Rate Cases, 230 U. S. 400; and
Stewart & Co. v. *Rivara*, 274 U. S. 614.

See also:

Clyde Mallory Lines v. *Alabama*, 56 Sup. Ct. Rep. 194;
Missouri Pac. v. *Larabee Flour Mills*, 211 U. S. 612; and
Wm. Cushing, et al., v. *Owners of the Ship John Frazier*, 62 U. S. 184.

It is interesting to note that the Supreme Court of the State of Washington recognized this concurrent jurisdiction in the cases of *The State* v. *Oregon-Washington Rr. & Nav. Co.*, 128 W. 38; and *State* v. *Ames*, 47 W. 328.

Consideration of the above citations and the rule enunciated therein can leave no doubt that the Supreme Court of the State of Washington clearly committed error in holding that the jurisdiction over navigation and commerce vested in the United States Government under Art. 1, Sec. 8 of the United States Constitution, is exclusive, and that the State may legislate only upon matters of pilotage in the realm of navigation and commerce even though the matters sought to be regulated are those of local concern.

Point C.

A reasonable fee levied by the State authorities to defray costs of inspection of vessels in connection with the regulation of harbor traffic does not constitute an unlawful burden upon interstate commerce.

This principle was established in the case of *Cooley* v. *Bd. of Port Wardens of Phila.*, 53 U. S. 298. The number

of cases in which this Honorable Court has followed this decision is legion. See:

Pittsburgh Southern Coal Co. v. *Louisiana,* 156 U. S. 590;

Packet Co. v. *Catlettsburg,* 105 U. S. 559;

Transportation Co. v. *Parkersburg,* 107 U. S. 691;

Morgan's Steamship Co. v. *Louisiana Bd. of Health,* 118 U. S. 455;

Gloucester Ferry Co. v. *Pennsylvania,* 14 U. S. 214;

Clyde Mallory Lines v. *State of Alabama ex rel. State Docks Comm.,* 56 Sup. Ct. Rep. page 194.

The fee prescribed in Sec. 26 of Chap. 200 of the Laws of 1907 (see Appendix "A" page 42), is obviously by its terms, not a fee for license, but is rather a fee for inspection. The fee is paid for a police service in connection with the regulation of the harbor traffic. The propriety of an exaction of this character levied under the authority of a State statute is fully established by the cases which have been cited above.

The conclusion that the State Supreme Court erred in characterizing the fee provided for by the State act as a license fee and as an unlawful burden upon interstate commerce is inescapable. Nowhere does Chap. 200 of the Laws of 1907 provide for the licensing of any of these vessels.

POINT D.

State regulations of harbor traffic, although they incidentally affect commerce, interstate or foreign, are of local concern, and so long as they are not made the subject of regulation by Congress they are not forbidden, as an unlawful burden upon interstate commerce.

The power so to regulate in the asbence of Federal statutes governing these matters of local concern, residing in the State as a legal power having its source in the sover-

eignty of the citizenry of that State, was recognized by this Honorable Court in the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 23, and has never been departed from.

That this power does not when exercised, constitute an unlawful burden upon interstate commerce or unlawfully interfere with the jurisdiction of the Federal Government over navigation is established by the following cases:

The License Cases, 46 U. S. 627;
Sherlock v. *Alling*, 93 U. S. 100;
Gilman v. *Philadelphia*, 70 U. S. 713; see also,
Minnesota Rate Cases, 230 U. S. 400;
Hennington v. *Georgia*, 163 U. S. 299;
Atlantic Coast Lines v. *Georgia*, 234 U. S. 280;
Clyde Mallory Lines v. *State of Alabama*, 56 Sup. Ct. Rep. 194;
Steamboat New York v. *Rea*, 59 U. S. 223.

A decision of the Supreme Court of the State of Michigan which dealt with a situation closely analogous in some respects to the factual circumstances in this case was that of *Burrows* v. *Delta Trans. Co.*, 64 N. W. 501, which, while being of no binding effect upon this Court under the *Stare Decisis* doctrine, yet is of a distinct interest. A Michigan statute providing for fire screens to be placed over smoke stacks on vessels plying the rivers of the State even though they be engaged in interstate or foreign commerce, was held to be valid by said Supreme Court. The case of *Smith* v. *Alabama*, 124 U. S. 465; *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Alabama*, 128 U. S. 96, and other United States Supreme Court decisions therein set out were cited as authority for sustaining the validity of the State statute. See also, *Leisy* v. *Hardin*, 135 U. S. 108.

The rule of law enunciated in these cases definitely establishes the error of the State Supreme Court in holding that

the provisions of Chap. 200 of the Laws of 1907 constituted a burden upon interstate commerce.

POINT E.

Chapter 200 of the Laws of 1907 does not interfere with the uniformity of maritime law.

Congress itself has recognized that the matter of regulating the various vessels in the different harbors of the United States constitutes a problem which is essentially local in character and therefore vested broad authority in the local steamboat inspectors. (See Sec. 4438 of Revised Statutes, Title 52, Regulation of Steam Vessels; see Appendix "B", page 51.)

This provision applies only to steam vessels. The Department of Commerce was likewise given power to promulgate rules and regulations providing for the licensing of officers on certain boats, the number of men constituting the crew to be required, the qualifications for engineers, masters and pilots for boats of different tonnage. All these matters are provided for in the rules and regulations of the Board of Supervising Inspectors, and said authority was delegated to the local inspectors who, under the rules and under Sec. 4463 of the United States Rev. Statutes, Title 63, have the authority to prescribe the number of licensed officers as well as the number of men in the crew which a boat is required to carry, in each of the several harbors of the United States and who exercise broad general supervisory powers with relation to these boats.

Evidently Congress took notice of the fact that local conditions of navigation were best known by the man detailed to enforce the statutes in his particular locality and he was best positioned to know the number of licensed officers as well as the crew required to operate a boat in those waters with safety. Two boats of the same size may

well require different sized crews to operate them because of inherent differences in construction. All these factors not only require, but demand, that the discretion of the local inspector in charge be exercised in dealing therewith.

These matters are purely of local concern. The matter of making the same rules and regulations pertaining to the vessels with which we are concerned in this action is similarly a matter of local concern.

Unquestionably, uniformity in the matter of regulating harbor traffic in the several harbors of the United States is a myth. See:

The License Cases, 46 U. S. 627;
Cooley v. *Bd. of Port Wardens*, 53 U. S. 298; and
Gibbons v. *Ogden*, 9 Wheat. 1, 6 Law. Ed. 23.

From *The License Cases*, 46 U. S. 627, we cite as follows from page 605:

> "Owing to situation and climate, every port and place where commerce enters a state must have peculiarities in its regulations; and these it would be exceedingly difficult for Congress to make; nor could it depute the power to corporations as the states do. The difficulties standing in the way of Congress are fast increasing with the increase of commerce and the places where it is carried on * * *. I admit that this condition of things does not settle the question of contested power; but it satisfactorily shows that Congress can not do what the states have done, are doing and must continue to do from a controlling necessity even should the exclusive power in Congress be maintained by our decisions."

See also language on page 624 of the above case; see also:

Hennington v. *Georgia*, 163 U. S. 299;
Atlantic Coast Lines v. *Georgia*, 234 U. S. 280;
New York, New Haven, Hartford Rr. Co. v. *New York*, 165 U. S. 628;

Minnesota Rate Cases, 230 U. S. 352; and also *Chicago, Rock Island & Pac. Railway Co.* v. *Arkansas*, 219 U. S. 453.

It was construed in the case of *Gibbons* v. *Ogden, supra*, that the power of the Federal Government to regulate navigation was derived from Sec. 8 of Art. 1 of the United States Constitution. The same rule, therefore, which governs the matter of uniformity with relation to interstate commerce, discussed in the cases above cited, must also apply to the matter of determining whether or not an interference exists with the uniformity of rules and regulations of the Federal Government relating to navigation.

Under the reasoning of the foregoing cases it must be plainly patent that the Supreme Court of the State of Washington failed to follow the decisions of this Honorable Court in holding that the provisions of Chap. 200 of the Laws of 1907 had a tendency to interfere with the uniformity of the Federal Maritime Law in this particular sphere.

Conclusion.

It is, therefore, respectfully submitted that the writ of certiorari should issue and that this Court should review the decision of the Supreme Court of the State of Washington and finally reverse it.

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APPENDIX "A".

CHAPTER II.

Regulation of Steam Vessels, etc.

SEC. 9843. *Commissioner of Labor to Enforce.*—The commissioner of labor shall be charged with the administration of the provisions of this act, shall employ the necessary inspectors to enable him to carry said provisions into effect, and shall exercise supervision over them in the performance of their duties. (Chap. 200, L. '07, p. 425, Sec. 1.)

SEC. 9844. *Inspection of Vessels—Investigation of Accidents.*—The commissioner of labor shall annually, or oftener if he has good cause to believe it reasonable, inspect, or cause to be inspected, every steam vessel or other vessel operated by machinery engaged in carrying passengers for hire or towing for hire, *except vessels which are subject to inspection under the laws of the United States,* examine carefully her hull, boats and other equipment, examine her engine and boilers, ascertain how long it will be safe to use the same, determine the pressure of steam to be allowed and so regulate the fusible plugs, safety valves and steam-cocks as to insure safety, and he may require such changes, repairs and improvements to be adopted and used as he may deem expedient for the contemplated route. He shall also fix the number of passengers that may be transported. He shall also, whenever he deems it expedient, visit any vessel licensed under this act and examine into her condition for the purpose of ascertaining whether or not any party thereon having a certificate from him has conformed to and obeyed the conditions of such certificate and the provisions of this act. The owner, master, pilot, captain or engineer of such vessel shall answer all reasonable questions, and shall give all the information in his or their power, in regard to said vessel, her machinery and the manner of managing the same.

In case of damage by fire or explosion or by means of an electrical apparatus, he may investigate the cause thereof, and if found by him to have been occasioned by

a violation of any of the provisions of this act, or of the orders, regulations and requirements issued by him, he shall so certify to the prosecuting attorney of the county where such violation occurred, together with the names of the persons guilty thereof and of the witnesses. (L. '07, p. 425, Sec. 2.)

SEC. 9845. *Boiler Tests—Inspection of Launches.*—The commissioner shall also test the boilers of all steam vessels, before the same shall be used, and at least once in every year thereafter. In subjecting to the hydrostatic test, boilers called and usually known under the designation of high pressure boilers, the hydrostatic pressure applied must be in proportion of one hundred and fifty pounds to the square inch to one hundred pounds to the square inch of the steam pressure allowed. And in subjecting to the hydrostatic test, that class of boilers usually designated and known as low pressure boilers, the commissioner shall allow as the working power of each new boiler, a pressure of only three-fourths the number of pounds to the square inch, to which it shall have been subjected by the hydrostatic test, and found to be sufficient therefor; but should said commissioner be of the opinion that such boiler, by reason of its construction or material will not safely allow so high a working pressure he may, for reasons specifically stated in his certificate, fix the working pressure of such boiler at less than three-fourths of said test pressure; and no boiler or pipe, or any of the connections therewith, shall be approved, which is made in whole or in part, of bad material, or is unsafe in its form, or dangerous from defective workmanship, age, use or other cause. In addition to the hydrostatic test as herein provided, the commissioner may cause a hammer test to be made and an internal examination of such boiler or boilers so tested, whenever deemed necessary. Any boiler having been in use ten years or more may be drilled at the bottom of shell or boiler, and also at such other points as the inspectors may direct to determine the thickness of such material at those points, and the general condition of such boiler or boilers at the time of inspection and the steam pressure allowed shall be determined by such ascertained thickness and gen-

eral condition of the boiler. He shall also see that all connections to the said boiler or engines are of suitable material, size and construction; and that the boiler, machinery and appurtenances are such as may be employed with safety in the service to be performed. He shall also satisfy himself that the safety valves are of suitable dimensions and that the weights of the same are properly adjusted, so as to allow no greater pressure than the maximum amount prescribed by him; and that there is a sufficient number of gauge cocks, properly attached to the boiler, so as to indicate the quantity of water therein; and suitable steam gauges to correctly show the amount of steam carried; and as to any other matter connected with such steam vessel or the machinery thereof, that to said commissioner shall seem necessary to the safety of her passengers and crew. And he shall make such inspection, examination and test of naphtha launches and electric launches and their apparatus and machinery, as will enable him to determine whether they can be safely used in navigation. (L. '07, p. 426, Sec. 3.)

SEC. 9846. *Certificate of Inspection.*—The commissioner, if satisfied that such vessel is in all respects safe and conforms to the requirements of this act, shall make and subscribe duplicate certificates, setting forth the age of the vessel, the date of inspection, the name of the vessel, the name of the owner, the master, the number of licensed officers and crew which he deems necessary to manage the vessel with safety, the number of boats and life-preservers required, and the number of passengers that she can safely carry, and if a steam vessel, the age of the boiler, and the pressure of steam she is authorized to carry. One of such certificates shall be kept posted in some conspicuous place on the vessel to be designated by the commissioner in the certificate and the other copy shall be kept by the commissioner and by him recorded in a book to be kept for that purpose. If the commissioner refuses to grant a certificate of approval, he shall make a statement in writing, giving his reasons for such refusal, and deliver the same to the owner or master of the vessel. (L. '07, p. 427, Sec. 4.)

SEC. 9847. *Number of Passengers.*—No greater number of passengers shall be transported upon any licensed steam vessel or other vessel included within the provisions of this act, than the number allowed in the certificate of such vessel, under a penalty of ten dollars, to be paid by the master for each passenger in excess of the allowed number, unless special permission is first obtained from the commissioner under such precautions as he deems expedient. (L. '07, p. 428, Sec. 5.)

SEC. 9848. *Protection of Woodwork Against Fire.*—All steamboats and other vessels to which this act is applicable, shall hereafter be so constructed that the woodwork about the boilers, chimneys, fireboxes, cookhouses, stove and steam pipes, or any machinery or apparatus involving danger of fire, where such woodwork is exposed to ignition, shall be so shielded by some incombustible material, that the air may circulate freely between such material and woodwork or other ignitible substances, and before granting a certificate of inspection, the commissioner shall require that all other necessary provisions be made throughout such vessel, as he may judge expedient to guard against loss or damage by fire. (L. '07, p. 428, Sec. 6.)

SEC. 9849. *Stairways and Gangways.*—Every vessel engaged in carrying passengers, shall be provided with permanent stairways and other sufficient means convenient for passing from one deck to the other, with gangways large enough to allow persons freely to pass, which shall be open fore and aft of the length of the vessel, and to and along the guards; and whoever obstructs such gangways by freight or otherwise shall forfeit fifty dollars to the state of Washington for every such violation. (L. '07, p. 428, Sec. 7.)

SEC. 9850. *Rules for Navigation of Vessels.*—From and after the passage of this act, the following rules shall be observed in navigating all steam vessels when under steam, and all boats propelled by machinery on *the waters within the jurisdiction of the state, excepting the waters which are under the jurisdiction of the United States:* * * * (L. '07, p. 429, Sec. 8.)

In view of the restrictive language used in the first paragraph of this section, the eighteen subdivisions have been omitted in the interests of brevity.

SEC. 9851. *Lights.*—The master of every steamboat or vessel propelled by machinery when navigating between sunset and sunrise, shall cause the same to carry the following lights:

(1) At the foremast head, a bright light of such a character as to be visible on a dark night, with a clear atmosphere at a distance of at least two miles; and be so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, and to be fixed so as to throw the light ten points on each side of the vessel from right ahead to two points abaft the beam on either side.

(2) On the starboard side a green light of such a character as to be visible on a dark night, with a clear atmosphere at a distance of at least two miles; and be so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side.

(3) On the port side a red light of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the port side. The green and red lights shall be fitted with inboard screens, projecting at least three feet forward from the lights, so far as to prevent them from being seen across the bow.

(4) The master of every vessel other than a steamboat anchored in the night-time shall cause her peak to be lowered and a good and sufficient light to be thrown from her taffrail in some part of her rigging and at least twenty feet above her deck. In the case of small vessels, the com-

missioner may make specific rules for lights different from the foregoing. (L. '07, p. 431, Sec. 9.)

* * * * * * *

SEC. 9854. *Life-Preservers—Buckets and Axes.*—Every steam vessel or vessel propelled by machinery used in the transportation of passengers for hire, shall have a life-preserver or life-float for each passenger she is allowed to carry and for each member of her crew. At least one-half thereof shall be life-preservers of the sort prescribed by the supervising inspector appointed under this act, and the other half or part thereof may be life-floats, to be constructed of dry pine plank, four feet long, two inches thick and twelve inches wide, with lines properly attached in such manner as to be convenient for use; and it shall be the duty of the commissioner to satisfactorily ascertain that every life-preserver and such life-floats are as herein required. Such life-preservers and life-floats shall be kept in convenient accessible places in such vessel in readiness for immediate use in case of accident, and the places where the same are to be kept shall be designated in the commissioner's certificate, and also pointed out by printed notices posted in such places as the commissioner directs. Every such vessel shall carry in convenient places, at least ten buckets filled with water, with dip lines attached, and three axes in good condition, but the inspectors may, if they deem it necessary or proper, require a larger, or in case of very small vessels, permit a smaller number of buckets and axes. (L. '07, p. 433, Sec. 12.)

SEC. 9855. *Obstruction of Safety Valves, etc., Prohibited —Penalty.*—Whoever intentionally loads or obstructs, or causes to be loaded or obstructed, in any way, the safety valve of the boiler, or employs any other means or device whereby the boiler may be subjected to a greater pressure than the amount allowed by the commissioner's certificate, or intentionally deranges or hinders the operation of any machinery or device employed to denote the state of the water or steam in any boiler, or to give warning of any approaching danger, or intentionally permits the water to

fall below the prescribed low water limit of the boiler, shall forfeit to the state of Washington the sum of five hundred dollars for each violation. (L. '07, p. 434, Sec. 13.)

SEC. 9856. *Examination for License as Master, Pilot and Engineer.*—Every person employed as master, pilot or engineer on board of a steam vessel or a vessel propelled by machinery, carrying passengers for hire or towing for hire, shall be examined by the commissioner as to his qualifications, and if satisfied therewith he shall grant him a license for a term of one year for such boat, boats or class of boats as said commissioner may specify in such license. In a proper case, the license may permit and specify that the master may act as pilot, and in case of small vessels also as engineer and pilot. The license shall be framed under glass, and posted in some conspicuous place on the vessel on which he may act. Whoever acts as master, pilot or engineer, without having first received such license, or upon a boat or class of boats not specified in his license, shall be liable to a penalty of fifty dollars for each day that he so acts, except as in this act otherwise specified, and such license may be revoked by the commissioner for intemperance, incompetency or willful violation of duty. (L. '07, p. 434, Sec. 14.)

SEC. 9857. *Standard Quality of Oil, to Be Used in Lights.*—No licensed vessel carrying passengers for hire shall be allowed to use in lamps, lantern or other lights on such vessels, any oil which will not stand a fire test of at least three hundred degrees Fahrenheit. (L. '07, p. 434, Sec. 15.)

SEC. 9858. *Name and Home Port on Stern.*—Every vessel subject to the provisions of this act, shall have her name and the port to which she belongs painted on her stern on a black background in white, yellow or gilt letters, or on a white background in black, yellow or gilt letters of not less than three inches in length. If any vessel, which is subject to the provisions of this act, shall be found without having her name, and the name of the port to which she belongs so painted, the owner or owners shall be liable to a penalty of fifty dollars to the state of Washington.

The commissioner may, however, in the case of small vessels, permit such name to be placed elsewhere and in letters of less length, the permission, the place of the name and length of letters to be stated in a certificate to be given to the master, who shall exhibit the same whenever requested. (L. '07, p. 435, Sec. 16.)

SEC. 9859. *Landing Passengers in Small Boats.*—Small boats containing passengers may be landed from or drawn to a steamboat by means of a line hauled in by hand, but in no case shall the line be attached to or hauled in by the machinery of any vessel. No passenger shall be put or suffered to go into any such small boat for the purpose of being landed until such small boats shall be completely afloat and wholly disengaged from the vessel, except held by a painter. A good and sufficient pair of oars suitable for the purpose shall be kept in such small boat. In landing or receiving any passenger in the night-time, there shall be a signal from the small boat at the shore by means of a horn or trumpet, to enable those having charge on board the vessel to determine when the small boat, having landed or received her passengers, is ready to leave the shore. (L. '07, p. 435, Sec. 17.)

SEC. 9860. *Same—Engines to be Stopped.*—While landing or receiving passengers the engine of the vessel shall not be put in motion except:

(1) To give sufficient force to carry the small boat to the shore, or,

(2) To keep the vessel in proper direction and to prevent her from drifting or being driven on shore; but in no case shall it be put in motion while passengers are being transferred from such vessel into a small boat for the purpose of being landed. (L. '07, p. 435, Sec. 18.)

SEC. 9861. *Regulation as to Carrying Combustibles.*—No loose hay, loose cotton or loose hemp, camphene, nitroglycerine, naphtha, benzine, benzole, coal oil, crude petroleum or other like explosive burning fluids or dangerous articles, shall be carried as freight or used in stoves on

any steamer or vessel licensed to carry passengers under this act; * * * (L. '07, p. 436, Sec. 20.)

SEC. 9863. *Penalty.*—Every master of a steamboat or vessel who shall violate any of the preceding sections of this act shall, for every such violation, forfeit to the state of Washington the sum of two hundred and fifty dollars, unless a different penalty is prescribed. (L. '07, p. 436, Sec. 21.)

SEC. 9864. *Liability of Owner of Vessel for Misconduct of Master.*—The owner of every steamboat or vessel shall be responsible for the good conduct of the master employed by him, and if any penalty incurred by such master is not paid by him and cannot be collected from him by due course of law, it may be recovered of the owner or owners, jointly or severally, of the steamboat or vessel in whose employ he was at the time of the incurring of such penalty, in the same manner as if such owner or owners were sureties of such master. (L. '07, p. 436, Sec. 22.)

SEC. 9865. *Copy of Act Shall be Posted.*—The master of every vessel shall keep a copy of the preceding sections of this act posted in a conspicuous place on such vessel for the inspection of all persons on board thereof. Every master violating the provisions of this section shall forfeit to the state of Washington, twenty-five dollars, and the additional sum of twenty-five dollars for each month such violation continues. (L. '07, p. 437, Sec. 23.)

SEC. 9866. *Commissioner's Report to Governor.*—The commissioner shall on or before the 1st day of January in each year, make a verified report to the governor containing a detailed statement of the names and number of vessels examined and licensed, the names and number of vessels to which licenses were refused and stating the reasons for the refusal, the names and number of persons examined and licensed, the names and number to whom licenses were refused and stating the reasons therefor, and may include in such report any other information he may deem desirable. (L. '07, p. 437, Sec. 24.)

SEC. 9867. *Penalty for Noncompliance With Act—Renewal of Certificates, etc.—Requirements of Launches Navi-*

gating the Straits.—All steam vessels, naphtha, gasoline and electric launches, or any craft propelled by machinery, carrying passengers for hire, or towing for hire must comply with all the terms and provisions of this act, and with all orders, regulations and requirements of the commissioner except that any such vessel not propelled by steam, or when not under steam, is exempt from the provisions in regard to the blowing of whistles. If any such vessel is navigated without complying therewith, except as herein stated, or without the requisite certificates of the commissioner, the owners and masters shall forfeit to the state of Washington the penalties prescribed in this act, and the vessel so navigated shall also be liable therefor, and may be attached and proceeded against in any court having jurisdiction. But if any such vessel is deprived of the services of any licensed officer, without the consent, fault or collusion of the master, owner or any person interested in the vessel, the deficiency may be temporarily supplied, until a licensed officer can be obtained. If the owner or master of any vessel shall at least twenty days before the expiration of his certificate notify the commissioner of such expiration and request a new inspection and certificate, the certificate then expiring shall continue in force until an inspection is made and such owners and masters are not liable for any of the penalties provided in this act on account of navigating said vessel, without such new certificate. No launch under ten tons carrying passengers shall navigate the waters of the straits of Juan de Fuca, unless provided with a boat of sufficient size to accommodate said passengers and be under the management of a person holding a United States license for steam vessels. (L. '07, p. 437, Sec. 25.)

SEC. 9868. *Fees.*—For each inspection provided for in sections 9844 and 9845 the owner or master of each vessel shall pay the commissioner of labor an inspection fee, which shall not be less than five dollars, nor more than twenty dollars, to be fixed by the commissioner of labor with reference to the size of the vessel inspected. For each license issued under section 9860 of this act the person so licensed shall pay to the commissioner of labor the sum of five dol-

lars. All of the fees received from this source shall be accounted for by the commissioner of labor to the state treasurer, and credited to the general fund. (L. '07, p. 438, Sec. 26.)

SEC. 9869. *Compensation of Inspectors.*—The inspectors provided for in this act shall receive seven dollars per diem for the time actually engaged in making the inspections and examinations provided for herein, and shall be paid necessary traveling expenses, when making such inspections and conducting such examinations at other than the domicile of said inspectors. (L. '07, p. 438, Sec. 27.)

SEC. 9870. *Authority of Inspectors.*—Any inspector duly employed by the commissioner of labor for the execution of any of the provisions of this act, shall be deemed to be a deputy of said commissioner for the purposes hereof, and may perform any act and exercise any authority herein prescribed for the commissioner of labor. (L. '07, p. 438, Sec. 28.)

APPENDIX "B".

TITLE 46—SHIPPING.

U. S. C. A. CHAPTER 14.

Vessels Subject to Inspection and Regulation.

SEC. 362. *Vessels Subject to Provisions of Chapter; Reciprocal Acceptance of Foreign Certificates of Inspection; Fees.*—All steam vessels navigating any waters of the United States which are common highways of commerce or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this and the following chapter and sections 214 and 215.

And all foreign private steam vessels carrying passengers from any port of the United States to any other place or country shall be subject to the provisions of sections 391, 392, 399 to 402, inclusive, 463 to 466 inclusive, 472, 475, 481, 494, 495, 497, and 498, and shall be liable to visitation and inspection by the proper officer, in any of the ports of the United States, respecting any of the provisions of the sections aforesaid: *Provided, however,* That when such foreign passenger steamers belong to countries having inspection laws approximating those of the United States, and having unexpired certificates of inspection issued by the proper authorities in the respective countries to which they belong, they shall be subject to no other inspection than necessary to satisfy the local inspectors that the condition of the vessel, her boilers, and life-saving equipments are as stated in the current certificate of inspection; but no such certificate of inspection shall be accepted as evidence of lawful inspection except when presented by steam vessels of other countries which have by their laws accorded to the steam vessels of the United States visiting such countries the same privilege accorded to the steam vessels of such countries visiting the United States; it being further provided that there shall be collected and paid into the Treasury of the United States the same fees for the

inspection of foreign passenger steamers carrying passengers from the United States that any foreign nation shall charge the merchant vessels of the United States trading to the ports of such nationality; it being further provided that the Secretary of Commerce shall have the power to waive at any time the collection of such fees upon due notice of the proper authorities of any country concerned that the collection of fees for the inspection of American steam merchant vessels has been discontinued.

It is further provided that the Secretary of Commerce may, in his discretion, permit any foreign passenger steamer coming within the provisions of this section whose foreign certificate of inspection shall have expired at sea since last leaving the country to which said vessel belongs, or while said vessel shall have been in a port of the United States, to sail upon her regular route without undergoing any further inspection than would have been required had said foreign certificate of inspection been in force: *Provided,* however, That such discretion shall be exercised only with respect of vessels operated upon regularly established lines, and in cases where such foreign passenger steamers will be regularly inspected by the authorities of her home government before her next return to a port of the United States. (R. S. Sec. 4400; Aug. 7, 1882, c. 441, Sec. 1, 22 Stat. 346; Mar. 1, 1895, c. 146, Sec. 1, 28 Stat. 699; Feb. 15, 1902, c. 23, 32 Stat. 34; Mar. 17, 1906, c. 955, Sec. 1, 34 Stat. 68; Mar. 4, 1913, c. 141, *37 Stat. 736.)

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Title 46—Shipping.

Sec. 364. *Vessels Navigating Coastwise and on Great Lakes.*—All coastwise seagoing vessels, and vessels navigating the Great Lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pur-

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* "Sec. 1" should be inserted after "141."

suance of law for the government of steam vessels in passing, as provided by this and the following chapter; and every coastwise seagoing steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. (R. S. Sec. 4401.)

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Mode, Manner, and Extent of Inspection: Certificates: Records.

SEC. 391. *Hulls and Equipments; Exemption of Vessels; Enforcement of Requirements.*—The local inspectors shall, once in every year, at least, carefully inspect the hull of each steam vessel within their respective districts, and shall satisfy themselves that every such vessel so submitted to their inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for passengers and the crew, and is in a condition to warrant the belief that she may be used in navigation as a steamer, with safety to life, and that all the requirements of law in regard to fires, boats, pumps, hose, life preservers, floats, anchors, cables, and other things are faithfully complied with; and if they deem it expedient they may direct the vessel to put in motion, and may adopt any other suitable means to test her sufficiency and that of her equipment. The local inspectors shall, once in every year, at least, carefully inspect the hull of each sail vessel of over seven hundred tons carrying passengers for hire and all other vessels and barges of over one hundred tons burden carrying passengers for hire within their respective districts, and shall satisfy themselves that every such vessel so submitted to their inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in condition to warrant the belief that she may be used in navigation with safety to life: Provided, That vessels while laid up and dismantled and out of commission may, by regulations

established by the board of supervising inspectors, with the approval of the Secretary of Commerce, be exempted from any or all inspection under this section and sections 392, 404, and 405. Whenever any inspector or assistant inspector shall, in the performance of his duty, find on board any vessel subject to the provisions of this and the following chapter, as part of the required equipment thereof, any equipment, machinery, apparatus, or appliances not conforming to the requirements of law, he shall require the same to be placed in proper condition by the owner or master of the said vessel, if possible; and if said inspector or assistant inspector shall find on board any such vessel any life preservers or fire hose so defective as to be incapable of repair, he shall require that the same be destroyed in his presence by such owner or master. And in any of the foregoing cases local inspectors by whom or under whose supervision said vessel is then being inspected shall have power to enforce the foregoing requirements by revoking the certificate of the said vessel, and by refusing to issue a new certificate to the said vessel until the said requirements shall have been fully complied with or until such action of the local inspectors shall have been reversed, modified, or set aside by the supervising inspector of the district on proper appeal by the owner or master of said vessel, which appeal shall be made to the said supervising inspector within ten days after the final action as aforesaid by the local inspectors; and upon such appeal, duly made, the supervising inspector shall have power to affirm, modify, or set aside such action by the local inspectors. (R. S. Sec. 4417; Dec. 21, 1898, c. 29, Sec. 4, 30 Stat. 765; Mar. 3, 1905, c. 1454, Sec. 1, 33 Stat. 1023; Mar. 4, 1913, Sec 1, c. 141, 37 Stat. 736.)

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SEC. 392. *Boilers and Appurtenances.*—The local inspectors shall also inspect the boilers and their appurtenances in all steam vessels before the same shall be used, and once at least in every year thereafter, and shall subject all boilers to the hydrostatic pressure. All such vessels shall comply with the following requirements, namely:

That the boilers are well made, of good and suitable material; that the openings for the passage of water and steam, respectively, and all pipes and tubes exposed to heat, are of proper dimensions and free from obstructions; that the spaces between and around the flues are sufficient; that flues, boilers, furnaces, safety valves, fusible plugs, low-water indicators, feed-water apparatus, gauge cocks, steam gauges, water and steam pipes connecting boilers, means of prevention of sparks and flames from fire doors, low-water gauges, means of removing mud and sediment from boilers, and all other such machinery and appurtenances thereof, are of such construction, shape, condition, arrangement, and material that the same may be safely employed in the service proposed without peril to life; and the local inspectors shall satisfy themselves by thorough examination that said requirements of law and regulations in regard thereto have been fully complied with. All boilers used on steam vessels and constructed of iron or steel plates, inspected under the provisions of section 408, shall be subjected to a hydrostatic test, in the ratio of one hundred and fifty pounds to the square inch to one hundred pounds to the square inch of the working steam power allowed. No boiler or flue pipe, nor any of the connections therewith, shall be approved, which is made, in whole or in part, of bad material, or is unsafe in its form, or dangerous from defective workmanship, age, use, or other cause. (R. S. Sec. 4418; June 19, 1886, c. 421, Sec. 14, 24 Stat. 82; Mar. 3, 1905, c. 1456, Sec. 1, 33 Stat. 1027.)

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SEC. 404. *Inspection of Ferryboats, Canal Boats, and Small Craft; Regulations; Licenses.*—The hull and boilers of every ferryboat, canal boat, yacht, or other small craft of like character, propelled by steam, shall be inspected under the provisions of this chapter. Such other provisions of law for the better security of life as may be applicable to such vessels shall, by the regulations of the board of supervising inspectors, also be required to be complied with before a certificate of inspection shall be granted, and no such vessel shall be navigated without a licensed engi-

neer and a licensed pilot: Provided, however, That in open steam launches of ten gross tons and under, one person, if duly qualified, may serve in the double capacity of pilot and engineer. All vessels of above fifteen gross tons carrying freight or passengers for hire, but not engaged in fishing as a regular business, propelled by gas, fluid, naphtha, or electric motors, shall be subject to all the provisions of this section relating to the inspection of hulls and boilers and requiring engineers and pilots, and for any violation of the provisions of this or the following chapter or sections 214 or 215 applicable to such vessels, or of rules or regulations lawfully established thereunder, and to the extent to which such provisions of law and regulations are so applicable, the said vessels, their masters, officers, and owners shall be subject to the provisions of sections 494 to 498, inclusive, relating to the imposition and enforcement of penalties and the enforcement of law. All vessels of fifteen gross tons or less propelled in whole or in part by gas, gasoline, petroleum, naphtha, fluid, or electricity, and carrying passengers for hire, shall carry one life preserver, of the sort prescribed by the regulations of the board of supervising inspectors, for every passenger carried, and no such boat while so carrying passengers shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors. No examination shall be required as a condition of the obtaining of such a license, and any such license shall be revoked or suspended by the local board of inspectors for misconduct, gross negligence, recklessness in navigation, intemperance, or violation of law on the part of the holder, and if revoked, the person holding such license shall be incapable of obtaining another such license for one year from the date of revocation. (R. S. Sec. 4426; Dec. 22, 1890, c. 26, 26 Stat. 692; Mar. 3, 1905, c. 1457, Sec. 4, 33 Stat. 1029; May 16, 1906, c. 2460, 34 Stat. 193.)

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SEC. 405. *Tugboats and Freight Boats.*—The hull and boiler of every tugboat, towing boat, and freight boat shall be inspected, under the provisions of this chapter; and the

inspectors shall see that the boilers, machinery, and appurtenances of such vessel are not dangerous in form of workmanship, and that the safety valves, gauge cocks, low-water alarm indicators, steam gauges, and fusible plugs are all attached in conformity to law; and the officers navigating such vessels shall be licensed in conformity with the provisions of chapter 11 and shall be subject to the same provisions of law, as officers navigating passenger steamers. (R. S. Sec. 4427.)

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SEC. 511. *"Motor Boats" Defined; Inspection.*—The words "motorboat" where used in this chapter shall include every vessel propelled by machinery and not more than sixty-five feet in length except tugboats and towboats propelled by steam. The length shall be measured from end to end over the deck, excluding sheer: *Provided*, That the engine, boiler, or other operating machinery shall be subject to inspection by the local inspectors of steam vessels, and to their approval of the design thereof, on all said motor boats, which are more than forty feet in length, and which are propelled by machinery driven by steam. (June 9, 1910, c. 268, Sec. 1, 36 Stat. 462.)

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Title LII.—Regulation of Steam-Vessels.—Ch. I.

SEC. 4427. R. S.—The hull and boiler of every tug-boat, towing-boat, and freight-boat shall be inspected, under the provisions of this Title; and the inspectors shall see that the boilers, machinery, and appurtenances of such vessel are not dangerous in form or workmanship, and that the safety-valves, gauge-cocks, low-water alarm-indicators, steam-gauges, and fusible plugs are all attached in conformity to law; and the officers navigating such vessels shall be licensed in conformity with the provisions of this Title, and shall be subject to the same provisions of law as officers navigating passenger-steamers.

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SEC. 4438. The boards of local inspectors shall license and classify the masters, chief mates, engineers, and pilots of all steam-vessels. It shall be unlawful to employ any person, or for any person to serve as a master, chief mate, engineer, or pilot on any steamer, who is not licensed by the inspectors; and any one violating this section shall be liable to a penalty of one hundred dollars for each offense.

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U. S. C. A., Title 28.

SEC. 344. *(Judicial Code, Section 237, Amended.)* *Appellate Jurisdiction of Decrees of State Courts; Certiorari.*—* * *

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1936

No. 552

E. PAT KELLY, as Director of the Department of Labor and Industries of the State of Washington; JAY OLINGER, as Supervisor of the Safety Division of Said Department, and HOWELL PARKER, as Deputy of Said Director under the Title, Marine Inspector.

Petitioners,

v.

STATE OF WASHINGTON on the Relation of FOSS COMPANY, INC., a Corporation; ALLMAN-HUBBLE TUGBOAT COMPANY, INC., a Corporation; BELLINGHAM TUG & BARGE CO., INC., a Corporation, *et al.* *Respondents.*

BRIEF OF PETITIONERS

G. W. HAMILTON,
Attorney General of the State of Washington,

W. A. TONER,
Assistant Attorney General of the State of Washington,

Office and Postoffice Address: Temple of Justice, Olympia, Washington

SUBJECT INDEX

	Page
I. Opinion of the Court Below	8
II. Jurisdiction—Concise Statement of Grounds of Jurisdiction	8
III. Statement of the Case	8
IV. Specification of Errors	17
ARGUMENT	20
General Statement of Appellants' Contention	27
Point "A": The Federal Government Has Not Completely Occupied the Sphere of Regulation Within Which Chapter 200 of the Laws of 1907 is Applicable and, Therefore, Said Statute Cannot Be Held to Be Invalid By the Implication of Silence Unless There is a Direct Conflict Between Its Terms and the Provisions of the Federal Law Applicable to this Field	29
Point "B": The State Has Concurrent Jurisdiction With the Federal Government to Regulate Navigation and Commerce in Matters Not Primarily of Local Concern and in the Absence of Federal Legislation the State May Legislate Upon the Subject Matter	36
Point "C": A Reasonable Fee Levied by the State Authorities to Defray Cost of Inspection of Vessels in Connection With Regulation of Local Traffic Does Not Constitute an Unlawful Burden Upon Interstate Commerce	37
Point "D": State Regulations of Harbor Traffic, Although They Incidentally Affect Commerce, Interstate or Foreign, Are of Local Concern and So Long as They Are Not Made the Subject of Regulation By Congress, They Are Not Forbidden as an Unlawful Burden Upon Interstate Commerce	38
Point "E": Chapter 200 of the Laws of Washington of 1907 Does Not Interfere With the Uniformity of Maritime Law	41
Appendix "A"	45
Appendix "B"	55

APPENDICES

Chapter 200—Washington Laws of 1907:

	Page
Section 1	45
2	45
3	46
4	47
5	47
6	48
7	48
8	48
9	48
12	49
13	50
14	50
15	51
16	51
17	51
18	52
20	52
21	52
22	52
23	52
24	53
25	53
26	54
27	54
28	54
Sec. 362, U. S. C. A., R. S., Sec. 4400; August 7, 1882, c. 441, Sec. 1, 22 Stat. 346	55
Sec. 364, U. S. C. A., R. S., Sec. 4401, Title 46—Shipping	56
Sec. 391, U. S. C. A., R. S., Sec. 4417; December 21, 1898, c. 29, Sec. 4, 30 Stat. 765, Title—46—Shipping	57
Sec. 392, U. S. C. A., R. S., Sec. 4418; June 19, 1886, c. 421, Sec. 14, 24 Stat. 82	58
Sec. 404, U. S. C. A., R. S., 4426; December 22, 1890, c. 26, 26 Stat. 692, Title 46—Shipping	59
Sec. 405, U. S. C. A., R. S., 4427, Title 46—Shipping.	60
Sec. 511, U. S. C. A., R. S., Title 46—Shipping; June 9, 1910, c. 268, Sec. 1, 36 Stat. 462	60

APPENDICES—*Continued*

Page

Sec. 515, U. S. C. A., R. S., Title 46—Shipping; June 9, 1910, c. 268, Sec. 5, 36 Stat. 463 61

Revised Statutes, Sec. 4427, Title 52—Regulation of Steam Vessels 61

Revised Statutes, Sec. 4438, Title 52—Regulation of Steam Vessels 62

Sec. 344, U. S. C. A., Title 28—Judicial Code, Sec. 237 "b" 62

TABLE OF CASES CITED

Abrams v. Van Schaick, 293 U. S. 188 24

Asbell v. Kansas, 209 U. S. 251 34

Atchison, Topeka, Santa Fe Ry. Co. v. Cal. R. R. Com., 283 U. S. 380, 391 ..... 24, 33

Atlantic Coast Line v. Georgia, 234 U. S. 280, 293 ... 41

Burrows v. Delta Transp. Co., 64 N. W. 501, 106 Mich. 582 39

Chicago, Milwaukee, St. Paul Ry. Co. v. Solan, 169 U. S. 133 34

Cooley v. Board of Port Wardens, 53 U. S. 298 ..... 27, 30, 36, 37

Cornell Steamboat Co. v. Sohmer, 235 U. S. 549 37

County of Mobile v. Kimball, 102 U. S. 692 30

Crossman v. Lurman, 192 U. S. 189 34

Gibbons v. Ogden, 22 U. S. 1 ..... 27, 30, 36

Gilman v. Philadelphia, 70 U. S. 713 41

Gloucester Ferry Co. v. Pa., 114 U. S. 196, 214 ..... 35, 38

Hennington v. Georgia, 163 U. S. 299 ..... 34, 41

Leisy v. Harden, 135 U. S. 100, 117 40

License Cases, 46 U. S. 627 31

Liverpool etc., Steamship Co. v. Emigration Com., 113 U. S. 33 23

Clyde Mallory Lines v. State of Alabama, 296 U. S. 261, 56 U. S. Sup. Ct. 194 ..... 30, 34, 37, 41

Minnesota Rate Cases, 230 U. S. 400 37

Missouri, Kansas & Texas Ry. Co. v. Haber, 169 U. S. 613 34

TABLE OF CASES CITED—*Continued*

	Page
Morgan Steamship Co. v. Louisiana Board of Health, 118 U. S. 455	35, 37
Old Dominion Steamship Co. v. Gilmore, 207 U. S. 398	30
Packet Co. v. Catlettsburg, 105 U. S. 559	35
Penn. Ry. Co. v. Hughes, 191 U. S. 477	34
Pittsburg and Southern Coal Co. v. Louisiana, 156 U. S. 590	35
Reid v. Colorado, 187 U. S. 137	34
Savage v. Jones, 225 U. S. 501, 533	25, 33, 43
Sherlock v. Alling, 93 U. S. 99	41
Sinnot v. Davenport, 63 U. S. 227, 16 L. Ed. 243, 247	41
State ex rel. Foss v. Kelly, 186 Wash. Reports 589, 592	8, 16, 17, 23
Steamboat New York v. Rea, 59 U. S. 223	37
Stewart & Co. v. Rivara, 274 U. S. 614	30, 37
Transportation Co. v. Parkersburg, 107 U. S. 691	35
Vandalia R. R. Co. v. Public Serv. Com. of Indiana, 242 U. S. 255	37
Wilmington Transp. Co. v. California R. R. Com., 236 U. S. 151	22, 35, 37
Wilshire Oil Co. v. U. S., 295 U. S. 100	24

TABLE OF STATUTES CITED

Page

Article I, Sec. 8, U. S. Constitution.....10, 18

Laws of the State of Washington of 1907, Chap. 200 (R. R. S.) (Sec. 9843, 9870, Incl.)
Sec. 2 .....9, 10, 14, 17, 18
Sec. 8 .....19, 20, 29, 31, 32, 36, 40

Load Line Act, United States Statutes at Large, Approved March 2, 1929, Vol. 45, page 1492.... 13

Sec. 362, U. S. C. A., R. S., Sec. 4400, Aug. 7, 1882, c. 441, Sec. 1, 22 Stat. 346, Title 46..... 11

Sec. 364, U. S. C. A., R. S., Sec. 4401, Title 46—Shipping 11

Sec. 391, U. S. C. A., R. S., Sec. 4417; Dec. 21, 1898, c. 29, Sec. 4, 30 Stat. 765, Title 46—Shipping..11, 32

Sec. 392, U. S. C. A.; R. S., Sec. 4418, June 19, 1886, c. 421, Sec. 14, 24 Stat. 82..... 11

Sec. 404, U. S. C. A., R. S., Sec. 4426; Dec. 22, 1890, c. 26, 26 Stat. 692, Title 46—Shipping..... 11

Sec. 405, U. S. C. A., R. S., Sec. 4427; Title 46—Shipping 11

Sec. 511, U. S. C. A., R. S., Title 46—Shipping; June 9, 1910, c. 268, Sec. 1, 36 Stat. 462.....11, 23, 25

Sec. 515, U. S. C. A., R. S..... 25

Sec. 344, U. S. C. A.—Title 28—Sec. 237 Subdiv. "B" of the Judicial Code..... 8

Rem. Rev. Stat., Title 52, Section 4438, Regulation of Steam Vessels..... 41

U. S. Rev. Stat., Title 63, Section 4463..... 42

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1936

No. 552

E. PAT KELLY, as Director of the Department of Labor and Industries of the State of Washington; JAY OLINGER, as Supervisor of the Safety Division of Said Department, and HOWELL PARKER, as Deputy of Said Director under the Title, Marine Inspector,

Petitioners,

v.

STATE OF WASHINGTON on the Relation of FOSS COMPANY, INC., *a Corporation*; ALLMAN-HUBBLE TUGBOAT COMPANY, INC., a Corporation; BELLINGHAM TUG & BARGE CO., INC., *a Corporation*; CAPITAL CITY TUG BOAT CO., INC., a Corporation; CROSBY SAND & GRAVEL COMPANY, INC., a Corporation; JAMES DRAHAM, FOSS LANUCH & TUG CO., INC., a Corporation; O. D. HOUCHAN, JOHNSON TUG & BARGE COMPANY, INC., a Corporation; JOHN W. and ALLEN McEWAN, Doing Business as McEwan Brothers; MERRILL & RING LUMBER CO., INC., a Corporation; NEMAH RIVER TOWBOAT COMPANY, INC., a Corporation; NORTHWESTERN LOGGING COMPANY, a Corporation; JOHN OLSON *and* ED. M. OLSON, Doing Business as Olson Tugboat Company; OLYMPIA TOWING COMPANY, INC., a Corporation; PIONEER TRANSPORT COMPANY, a Corporation; PUGET SOUND TUG & BARGE CO., INC., a Corporation; SCHAFER BROS. LUMBER & SHINGLE COMPANY, a Corporation; SHIVELY TOW BOAT COMPANY, INC., a Corporation; DELTA V. SMITH, SUNSET TUG & BARGE CO., a Corporation; TACOMA TUG & BARGE CO., INC., a Corporation; FRED W. THURBER, TRANSIT TOWBOAT COMPANY, INC., a Corporation; R. J. ULTICAN TUGBOAT CO., INC., a Corporation; WAGNER TUG BOAT COMPANY, a Corporation; CLIFFORD W. WATERMAN, Doing Business as Waterman Towing Co.; KNAPPTON TOWBOAT CO., a Corporation, and SHAVER TRANSPORT CO., a Corporation,

Respondents.

BRIEF OF PETITIONER

I

OPINION OF THE COURT BELOW

The opinion of the Washington supreme court is reported in Volume 186, Washington Reports, at page 589, and is likewise set out in the record accompanying the petition, pages 140 to 146, dissenting opinion, R. 146 to 150.

II

JURISDICTION

CONCISE STATEMENT OF GROUNDS OF JURISDICTION

The cause comes before this court upon an order of this court entered January 18, 1937, granting the petitioners a writ of certiorari based upon the provisions of Section 237, Subdivision B of the Judicial Code (U. S. C. A. Title 28, Section 344).

III

STATEMENT OF THE CASE

Chapter 200 of the Laws of Washington, 1907, contains a comprehensive code for the inspection of steamboats or other vessels operated by machinery engaged in carrying passengers for hire or towing for hire, excepting vessels which are subject to inspection under the Laws of the United States. The act also provides, among other things, for the licensing of officers employed to operate the boats which come under the provisions of the act and vests au-

thority in the department of labor and industries, through its officers, to require adequate personnel to safely operate the said vessels.

The 31 plaintiffs own 172 tugboats which travel mainly upon the inland waters of the State of Washington, including Puget Sound, Grays Harbor and the Columbia River. These boats occasionally sail into Canadian waters and likewise at times travel outside of the inland waters of the State of Washington upon the high seas. (R. 34, 41.) 139 of these vessels are operated by internal combustion engines; the remainder are operated by steam. (R. 34.) The questions presented in this action concern the authority of the State of Washington to enforce, through the department of labor and industries, the provisions of said Chapter 200 of the Laws of Washington, 1907, with reference to these 139 tugboats. The plaintiffs in the superior court for Thurston County asked a writ of prohibition alleging, among other things, that the director of the department of labor and industries, through his subordinates, was about to institute suit for penalties against these plaintiffs and all other tugboat owners who were navigating vessels not subject to inspection by the United States Steamboat Inspectors in or upon any waters lying within the boundaries of the State of Washington, unless they, among other things, (a) submitted their vessels annually or oftener for inspection by duly constituted state officers; (b) made such changes and improve-

ments as might be required by the state department officers; (c) carried such officers on said vessels as the state department had licensed as master pilots and engineers after an examination; (d) carried such crews as required by the director to manage each vessel with safety. (R. 16, 17, 18.)

Plaintiffs further allege that the director was about to prosecute the plaintiffs for failing to comply with all of the remaining provisions of Chapter 200 of the Laws of 1907. Plaintiffs below alleged in their petition for a writ of prohibition that the acts contemplated by the director constituted a violation of Section 8, Article 1 of the United States Constitution (R. 22), and contend also that Chapter 200 of the Laws of 1907 was in direct conflict with the laws of the United States which provided for inspection and boarding of said vessels by officers and inspectors of the Board of Navigation and Steamboat Inspection Service and by all Coast Guard officers (R. 22).

The plaintiffs below further alleged in the petition for writ of prohibition that if your petitioners, defendants below, were not prohibited from enforcing the provisions of said Chapter 200 of the Laws of 1907, they would be deprived of their property without due process of law and would further be deprived of equal protection of the law within the intent and meaning of the Fourteenth Amendment to the Constitution of the United States (R. 22).

Your petitioners, defendants in the trial below, answered the complaint alleging in defense that the acts contemplated to be done by them constitute a valid exercise of authority under the provisions of the law in question (R. 27). At the trial the defendants summoned the officers of the United States Customs Department and Deputy in charge of the Marine Division of the Federal Government for the Puget Sound Area, who testified as to their duties under the Federal statutes (R. 69-105, Incl.). The petitioners here, and defendants below, made and make no claim to inspect or regulate boats of the steamboat category (R. 15, 16, 121, 122, 123). The 139 motor tugboats in question are engaged exclusively in the business of towing (R. 34). The main part of the towing done by these vessels is intrastate but substantially all of them are capable of doing coast-wise service and in some instances do so (R. 41, 42). None of the vessels which we designate herein as motor tugboats are inspected by the United States Inspector of Steamboats for the district or districts within which these boats operate (R. 46, 51, 52, 71, 72, 73, 77, 81, 86, 87, 88, 89, 92, 101). It was conceded by the appellants below, the respondents here, that at the time of trial in the lower court the Federal statutes relating to the inspection of vessels and particularly Sections 362, 364, 391, 392, 404, 405, 511, Title 46 of the U. S. C. A. set out in Appendix "B" in this brief, had been interpreted to vest no authority in the inspec-

tors of steamboats to exercise their authority upon the motor tugs here in question (R. 46, 47, 78) for the purposes of determining the fitness of mechanical equipment, engines, boilers, pressure tanks and all other machinery used in the propulsion of the vessel, and it was likewise conceded that the United States Inspectors of hulls and boilers, who are under the jurisdiction of the United States Department of Commerce, have not authority to inspect the boats in question under the United States Steamboat Inspection Laws (R. 52). Further, that the United States Coast Guard Service made no attempt to inspect the vessels here sought to be inspected and regulated by your petitioners for the purposes of determining the seaworthiness of the hulls of the vessels and the fitness of the mechanical equipment with relation to the safety with which said equipment might be used by the crew (R. 48, 52). (Defendants' Exhibit 5.)

These vessels are subject to no regular inspection service of the Federal government to determine the seaworthiness of the vessel, the fitness of its physical structure and the state of physical repair or disrepair of its propelling machinery (R. 54, 55). Likewise, there is no Federal agency which exercises any supervision or control or licenses the officers or persons in charge of the navigation of these vessels (R. 54, 55, 81, 82, 96). The Coast Guard of the United States government does board these vessels for the purpose of determining whether

they are complying with the general rules relative to navigation which deal with lights, fog horns, whistles, life preservers and fire extinguishers, and they investigate to corroborate the name and the official number of the vessel in question (R. 61, 62). The American Bureau of Shipping under the Load Line Act and the Load Line Treaty of 1930, through the American Inspection Society does inspect motor vessels over 150 tons gross for seaworthiness upon their departure on a foreign voyage outside of the sheltered area (R. 70). Of the vessels herein involved, there are but three motor tugs which exceed 150 tons gross (R. 70). The Federal government through the Customs Service measures these vessels at the time of their construction in order to have the correct measurements for the purposes of classification in connection with registration or enrollment (R. 71).

This investigation has not for its purpose the determination of the seaworthiness of the hull or the safety or fitness of any of the motor tugs in question (R. 72). No Federal law requires motor tugs to carry life boats (R. 72). The Federal law does not require officers on the tug boats to be licensed (R. 78).

It is true the inspector of hulls of the Bureau of Navigation of the Steamboat Inspection Service of the Department of Commerce is required to examine motor tugs, such as the vessels with which

we are concerned in this action, at such time as the vessel may change its name, but this examination is made solely for the determination of the name and tonnage and said examination is not concerned with the seaworthiness of the hull or the fitness of the equipment or of the question of whether or not the boat may be operated with safety (R. 81, 82).

There are many landlocked lakes in the State of Washington upon which steamboats and other vessels ply. The jurisdiction of the State of Washington with reference to these boats is not in question in this proceeding. Some of the provisions of Chapter 200 of the Laws of 1907 refer specifically and exclusively to said landlocked waters which are under the exclusive jurisdiction of the state and are not within the jurisdiction of the United States (See Section 8, Chapter 200, Laws of 1907, Appendix A, at page 48). The state law in question was intended to apply to all vessels operating upon the landlocked waters of the State of Washington and also to such vessels navigating on the waters within the state under the jurisdiction of the United States which are not subject to inspection under the laws of the United States.

The legal dispute in this case revolves around the question of the application of many of the provisions contained in the state law which, if applied in regions subject to Federal jurisdiction, would be in conflict with Federal legislation, such as provi-

sions dealing with rules for navigation, sections dealing with ferry boats, painting of names and the like where the Federal government has made uniform rules applicable to navigation on waters under its jurisdiction. The provisions contained in the sections of the state law, however, can be given full force and effect when applied exclusively to landlocked waters of the state. The legal controversy in this question is whether or not the Federal government has completely occupied the field for regulation with reference to motor tugs by reason of having vested authority in the Coast Guard Service to limited and specified acts which have heretofore been described. Counsel for the respondents here contended in the court below that the Washington law is invalid because the Federal law has already completely occupied the field so as to leave the state no sphere within which its laws may function without coming into conflict with the Federal statutes by virtue of which the powers mentioned were vested in the officers of the Coast Guard Service and the Steamboat Inspection Service of the United States government.

Respondents' counsel contended in argument before both the trial court and the state supreme court that the statute in question constitutes interference with the uniformity of the maritime law and that the provisions of the statute also constitute a burden upon interstate commerce.

There are some 400,000 motor tugs throughout the nation which are subject to the same limited governmental supervision as are the boats to which the provisions of the Washington law have been sought to be applied by the state authorities. In the court below, counsel for the respondent conceded that it was the legislative intention of the State of Washington to apply the statute in question generally to all of the navigable waters within the State of Washington excepting in those places where the statute specifically provided that its provisions would apply only to the landlocked waters of the state.

In the supreme court of the State of Washington in the case below, *State ex rel. Foss vs. Kelly*, 186 Wash. 589, 592, it was said:

"The Federal legislation with respect to vessels and navigation in navigable waters is of vast extent, and seemingly it covers every situation and condition which the Congress has considered to be necessary or advisable to cover. Even row boats are required to carry a lantern showing a white light to be exhibited under certain conditions. (U. S. C. A., Title 33, Sec. 77)."

And further:

"All of the vessels involved in this case, whether registered or enrolled, or enrolled and licensed to engage in the coast-wide trade come under the Federal legislation. Motor boats not more than 65 feet in length are defined and regulated by Chapter 16, Title 46, U. S. C. A. True, that chapter does not

require inspection for seaworthiness or the examination and licensing of officers, but presumably Congress went as far in the regulation of such boats as it thought to be necessary."

The court then substantially found that the provisions in question, by reason of the fees charged for inspection, interfered with the use of the vessels as instrumentalities of interstate commerce.

State ex rel. Foss vs. Kelly, supra, at page 596:

"So here, the license fee is a tax, and the other regulations, speaking generally, are all burdens upon navigation and to some extent upon interstate commerce."

IV

SPECIFICATION OF ERRORS

(1) The Supreme Court of the State of Washington erred in reversing the judgment of the Superior Court of the State of Washington dismissing the petition for a writ of prohibition.

(2) The Supreme Court of the State of Washington erred in holding that Congress had legislated so completely with reference to all vessels plying the navigable waters of the State of Washington so as to have fully occupied the sphere within which legislation pertaining to said vessels could be enacted and in consequence thereof, Chap. 200 of the Laws of 1907 was invalid as applied to navigable waters over which the Federal Government has jurisdiction.

(3) The Supreme Court of the State of Washington erred in holding that the State of Washington did not have general concurrent power to legislate upon matters pertaining to navigation and commerce of intrinsically local concern upon which the Federal government had not legislated, the said state court holding the authority of the United States Government, under Art. 1, Sec. 8 of the Federal Constitution, to be exclusive in all matters relating to navigation and commerce irrespective of whether they were of local or national concern, excepting, in the matter of pilotage which constituted an exception wherein the state could legislate in the absence of Congressional enactments.

(4) The Supreme Court of the State of Washington erred in holding that in matters primarily of local concern, the silence of Congress in relation to matters affecting, in some degree, navigation and commerce was to be construed to be an implication that Congress considered that those matters which had not been made subject to Federal regulation were to be left unlegislated upon and that in consequence thereof, Chap. 200 of the Laws of 1907, the provisions of which were directed to regulation of those matters of local concern which had not been brought within the scope of Federal supervision and control by Congress, was invalid, even though there existed no conflict between the provisions of the state statute and the Federal laws in this field.

(5) The Supreme Court of the State of Washington erred in holding that the provisions of Chap. 200 of the Laws of 1907 constituted an unlawful burden upon interstate commerce.

(6) The Supreme Court of the State of Washington erred in holding that the provisions of Chap. 200 of the Laws of 1907 interfered with the uniformity of Maritime Law.

ARGUMENT

General Statement of Appellants' Contention

It must be remembered that the boats which are regulated by Chapter 200 of the Laws of 1907 of the State of Washington, see Appendix "A", page 45, are boats engaged in towing for hire—that is, the State of Washington does not attempt to regulate these boats as boats, but only as engaged in a particular occupation which is the business of towing for hire.

Many Washington cities are located on the bays and inlets of Puget Sound. The inland waters of Puget Sound include a large body of navigable waters. This is, of course, a natural highway for navigation.

The United States has regulated navigation by rules applicable to vessels of all sorts. It regulates vessels in Puget Sound carrying passengers to such an extent that the state department makes no claim to regulate such boats under Chapter 200. The boats in question are licensed or enrolled under the laws of the United States. Counsel contended for the respondent here, plaintiff below, in the cause below that all of these boats were subject to inspection under the laws of the United States and for this reason were not subject to regulation by Chapter 200 because it excepted such vessels as are sub-

ject to inspection under the laws of the United States.

The Supreme Court of the State of Washington, however, reached the conclusion that the boats were covered by the Washington act, but that inasmuch as the Washington act was held to burden interstate commerce and interfere with the uniformity of the Federal navigation laws, it was void. The question is thus squarely presented — whether or not there is a field for regulation with respect to any of the 139 vessels owned by the respondents which is not occupied by the Federal regulations and, therefore, open to state regulation.

The tug boats here in question largely operate upon the inland waters of the State of Washington. These inland waters are subject to the jurisdiction of the United States, but they are also a part of the territory of the State of Washington for the physical boundaries of the state include the water in question. For purposes of navigation and commerce, the United States has jurisdiction. For other purposes of various kinds the state has jurisdiction. The state has the right, for instance, to regulate and control fishing in these inland waters. It owns tidelands around the shores. It regulates the ports and the harbors. It has the right of taxation. Quarantine and health laws are within its power and we contend it has the power to pass local measures to protect itself against persons or things dangerous to the peace and morals.

The motor tug boats in question frequently engage in operations constituting a part f interstate or foreign commerce. Occasionally they move a raft of logs across an arm of the sound or perform miscellaneous services about the various ports. In all of these services they use the inland waters. There is no question but that the United States has the power to completely regulate traffic over the inland waters considered simply as traffic or navigation. It seems equally well settled that within the ports, the local authorities have direction.

Commerce between the various cities located on Puget Sound is not interstate commerce simply because boats in traveling from one port to another cross navigable waters. See *Wilmington Transportation Co. vs. California Railroad Commission,* 236 U. S. 151. The tug boats making trips between the various ports of the State of Washington are thus within local jurisdiction of the state. That the United States jurisdiction is exclusive when exercised may be conceded. The state may not legislate upon a subject within the maritime jurisdiction, if the United States has occupied the field. Where there is no Federal legislation on a subject, it does not follow that a state may not legislate upon that subject even though it is one within maritime jurisdiction. The United States has not provided for the inspection of vessels less than sixty-five feet in length either as to seaworthiness, safety of machinery or adequacy of crews. For motor tug boats in

excess of sixty-five feet, there are no regulations whatever except that such boats, of course, would be subject to being boarded by the Customs Officials or the Coast Guard and a superficial examination made of lights, fog horns, whistles, life preservers, fire extinguishers and for corroboration of the names and official numbers of the boats. The provisions of the Washington law, it is true, do not specifically refer to motor tugs more or less than sixty-five feet in length, but they are none the less effective as to such vessels. As to these motor tugs then, particularly to ones more than sixty-five feet in length and less than 150 tons burden, the United States motor code does not apply. (Act of June 1, 1910, U. S. C. A. Title 46, Chapter 11, Shipping, 268, Section 1, 3636 Statutes, 462 (Section 511 Appendix).) The respondents herein made a general attack upon the constitutionality of the Washington law and their application for an injunction or a restraining order must fall, if any part of the chapter is enforceable as to any of their boats, because the action is brought not against certain specific acts but to declare the whole law unconstitutional and ineffective. If the respondent has rights, as to certain of its boats, these may be protected in specific instances if and when the director attempts to enforce provisions of the act in conflict with the laws of the United States. (Dissenting Opinion of Judge Blake, 186 Wash. 596, at page 601); *Liverpool, etc. Steamship Company vs. Emigration Com-*

missioners, 113 U. S. 33; *Abrams vs. Van Schaick*, 293 U. S. 188; *Wilshire Oil Company vs. U. S.*, 295 U. S. 100.

The prevailing opinion in the court below is based upon the proposition that inasmuch as the Federal legislation in respect to vessels and navigation in navigable waters, is of vast extent and seemingly covers every situation and condition which Congress has considered to be necessary or advisable to cover, the state is prohibited from passing any regulations whatever concerning the operation of any kind of vessel or boat. We apprehend that the rule is otherwise. In a matter referring to interstate traffic by railways in the case of *Atchison, Topeka, Santa Fe Railway vs. The California Railroad Commission*, 283 U. S. 380, page 391, this court in an opinion by Justice, now Chief Justice, Hughes, says:

"The argument is that as to union terminal facilities, joint use of track and abandonment of lines, the Congress has occupied the field and that all authority has been abrogated. *Northern Pacific Railway vs. Washington*, 222 U. S. 370; *Pennsylvania Public Service Railway vs. Public Service Commission*, 250 U. S. 566; *Colorado vs. United States*, 271 U. S. 153; *Alabama & Vicksberg Railway vs. Jackson*, 271 U. S. 244; *Missouri Pacific vs. Porter*, 273 U. S. 341. The contention presupposes that state authority could be exerted were it not for the provisions of the Federal legislation. That is that it was the intent of Congress to prevent the exercise of state power in this matter of serious public interest, although no authority was given to

the federal commission to meet the public need. Such an intention to override existing state authority to deal with local exigencies is not to be imputed to Congress unless its enactment compels that conclusion * * *."

At page 392:

"The principal thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the state of its authority as to matters not covered by the Federal legislation is not to be implied unless the act of Congress fairly interpreted is in conflict with the law of the State.

Savage vs. Jones, 225 U. S. 501, 533, and other cases."

We call particular attention to the motor code law, Title 46, Sec. 515, Appendix page 60. A careful reading of this section indicates clearly that motor boats more than sixty-five feet in length, although not covered by the remaining sections relating to certain regulations therein, are required to carry life preservers or life belts, etc., to be prescribed and then the balance of the section refers to motor boats as defined in Section 511. The concluding words of the said Section 515 are:

"* * * motor boats shall not be required to carry licensed officers except as required in this chapter."

This provision clearly refers only to boats less than sixty-five feet in length and clearly omits more than thirty of the boats involved in this pro-

ceeding. The language is significant. There is no place in the shipping law that requires motor boats or boats propelled by motors to carry licensed officers and the inference is clearly a prohibition against the state laws as well as national laws that would require that particular sort of a motor boat to carry a licensed officer. It seems significant that Congress should use the particular form of words unless it contemplated that state regulations were to be controlled rather than national legislation upon the particular question, for certainly the section was susceptible of amendment at any time by the Congress and a general law of a later date might quite properly repeal this portion of the section by implication.

GENERAL STATEMENT

Specifications of error Nos. 2 and 4 though constituting two distinct and separate grounds of error by the state supreme court are so closely interwoven that they are treated together under Point "A" in the argument. We propose, therefore, to discuss the argument under the points mentioned in our brief for the writ of certiorari.

POINT "A"

Since the record undisputably reveals that the vessels in question are not subject to inspection by the Federal government for many purposes of substantial importance with relation to the safety of the crew navigating upon the inland waters of the state, the provisions of the state statute which are directed toward regulating matters of local concern must be held valid in the absence of Congressional legislation. It is well established that Congress may subscribe its regulation and occupy the regulated field and the intention to supersede the exercise by the state of its authority as to matters not covered by the Federal legislation is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. *Gibbons vs. Ogden*, 22 U. S. 1, 6 L. Ed. 23.

POINT "B"

It has been well settled ever since the case of *Cooley v. Board of Port Wardens*, reported in 53

U. S. 298, that the state has concurrent power to regulate generally all matters affecting navigation and commerce in the absence of Federal legislation when the object of the legislation is to govern and control matters of peculiarly local concern.

POINT "C"

The rule is well settled that the collection of inspection fees by a state does not constitute an unlawful tax upon interstate commerce where such fees are collected for inspections relating to matters of local concern affecting navigation and commerce where Congress has remained silent.

POINT "D"

It has been the uniform rule of this court that the state has the power to legislate upon matters of local concern where the health and safety of its citizens are involved. In those instances where the Federal government has not legislated and though interstate commerce and navigation are to some degree affected, the state statute is not invalid solely by reason thereof.

POINT "E"

There is no uniform provision of maritime law relating to harbor traffic and local matters in the several parts of the United States. The regulation of harbor traffic with respect to safety of the traffic in the harbors is a matter which is peculiarly local in character and in no way interferes with the char-

acteristic uniformity of maritime law. The duty of regulating harbor traffic has been delegated to local inspectors in the several districts within the circumscribed limits wherein the Federal government has acted.

POINT "A"

The Federal Government Has Not Completely Occupied the Sphere of Regulation Within Which Chapter 200 of the Laws of 1907 Is Applicable and, Therefore, Said Statute Cannot Be Held to Be Invalid by the Implication of Silence Unless There Is a Direct Conflict Between Its Terms and the Provisions of the Federal Law Applicable to This Field.

Motor boats engaged in the business of towing for hire which are involved in this action largely confine their operations to the inland waters of the State of Washington (R. 41, 42). It is important to the State of Washington upon its inland waters that these vessels be fit for operation; that their propelling machinery be suitable so that they will not break down in the lines of traffic; the hull must be sound and seaworthy; the crew must be sufficient in number so that a sufficient watch will at all times be maintained to prevent collisions. The safety of these vessels, both as to their crew and to the citizens of the State of Washington who travel upon the inland waters, is a matter of immediate and local concern which demands in the interests of the population of the state at large regulation as to these matters with respect to these tug

boats continuously and constantly traversing its inland waters for the protection of the life, health, peace and property of the public at large.

Stewart and Company vs. Rivara, 274 U. S. 614;

Gibbons vs. Ogden, 22 U. S. 1, 6 L. Ed. 23;

County of Mobile vs. Kimball, 102 U. S. 692;

Cooley vs. Board of Wardens, 53 U. S. 298;

Clyde Mallory Lines vs. State of Alabama, 296 U. S. 261;

Old Dominion Steamship Company vs. Gilmore, 207 U. S. 398.

The testimony in this case is that the largest part of the work done by these tugs is confined to purely intra-state business upon the inland waters of the State of Washington. (See testimony of Captain Davis, R. 64):

Q. "What portion of your business is from a point in Washington to a point in Washington?

A. "Well, that varies. Today, 100% of it I think, but it varies with the needs of the business."

The record abounds with admissions on the part of the various tug boat owners called to testify to the effect that diesel tugs are not subject to Federal inspection as to seaworthiness and safety of their propelling equipment (R. 52, 61).

We recognize that the question whether or not inspectors of the Federal government inspect the boats is more largely a question of the Federal law as a matter of statutory construction than it is as a matter of evidence. We have brought out in the

evidence the manner and kind of inspections made by the Federal government to show that in practice the Federal rules concerning navigation do not cover inspection of the boats for seaworthiness or safety of the propelling machinery or the adequacy of the crew to properly operate the boat. In the *License Cases*, 46 U. S. 627, the rule is stated in these words:

"As a general rule, the power of a state over all matters not granted away must be as full in the bays, ports and harbours within her territory, *intra fauces terrae*, as on wharves and shores, or interior soil. And there can be little check on such legislation, beyond the discretion of each state, if we consider the great conservative reserved powers of the states, in their quarantine or health systems, in the regulation of their internal commerce, in their authority over taxation, and, in short, every local measure necessary to protect themselves against persons or things dangerous to their peace and their morals."

Section 2 of Chapter 200, Laws of 1907 Washington, Appendix "A", page 45, herein provides substantially that the Commissioner of Labor shall annually inspect or cause to be inspected every vessel operated by machinery and towing for hire, except vessels which are subject to inspection under the laws of the United States, shall examine carefully her hull, boats and other equipment, shall examine her engine and boilers, ascertain how long it will be safe to use the same. This provision follows closely the provisions of the Federal Act pertaining

to steamboats. 391 U. S. C. A., Title 461, see Appendix "B", page 57.

There is no provision in the Federal statutes for the inspection of these tow boats for seaworthiness or structure of the vessel itself, nor for the mechanical fitness of the propelling machinery (R. 47).

There is no provision in the Federal law which requires licensing of the officers in command of these motor tugs. In fact, the Federal law provides that as to such of them as come within the definition of a motor boat under Chapter 16 of Title 46 of U. S. C. A., that is, those which are less than sixty-five feet long, licensed officers are not required. No provision is made by Federal law as to the number of men which shall comprise the crew which shall insure safe operation of said boats. No Federal agency makes periodic, thorough, comprehensive inspections of these vessels as to the fitness of their structure generally with reference to the safety with which they may be operated. The Coast Guard Service of the Department of Commerce has some limited functions to perform with respect to these motor tugs as well as all other vessels. The Customs Department also has authority to board these vessels but none of them make inspection of these boats, engaged in towing for hire, of the kind and for the purposes provided by the state statute. The inspection intended by Section 2 of Chapter 200, Laws of 1907 of Washington, did

not contemplate the circumscribed and routine police inspection of lights and superficial equipment made by the Coast Guard Service above decks, but contemplated rather a rigid, periodic, thorough going-over from stem to stern and from deck to hold. The statute is expressly limited in its application to vessels not subject to inspection by the Federal law and there is, therefore, no conflict between the Washington State law and the Federal law, express or implied. During the course of the trial, the defendants below, petitioners here, disavowed any intention of regulating those boats with respect to many of the matters complained of and at all times alleged that they claimed no rights except substantially the ones to which reference is made in this brief and in our petition and writ of certiorari.

That the state has the undoubted power to regulate in this field in the absence of Federal legislation has already been referred to, page 24, where the case of *Atchison, Topeka and Santa Fe Railroad Co. v. California Railroad Commission* is cited. The case of *Savage vs. Jones*, therein referred to, 225 U. S. 501, 533, states the following rule:

"But the intent to supersede the exercise by the State of its police power as to matters not covered by Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state."

See also:

Reid vs. Colorado, 187 U. S. 137;
Hennington vs. Georgia, 163 U. S. 299;
Chicago, Milwaukee, St. Paul Ry Co. v. Solan, 169 U. S. 133;
Missouri, Kansas & Texas Railway Co. v. Haber, 169 U. S. 612;
Pennsylvania Ry. Co. v. Hughes, 191 U. S. 477;
Crossman v. Lurman, 192 U. S. 189;
Asbell v. Kansas, 209 U. S. 251.

The determination of the question of conflict between the provisions of the state and Federal statutes in this sphere is a Federal question and in deciding it the Washington supreme court failed to follow the rule of law established by this court in deciding a controversy involving the voiding of a state statute by reason of conflict with Federal regulations. The court below disregarded the principles of law applied in the case of the *Clyde Mallory Lines vs. State of Alabama*, 296 U. S. 261, where, in a decision citing a large number of cases, this court reached the conclusion that state regulations of harbor traffic, although they substantially affect commerce, interstate or foreign, are of local concern so long as they do not interfere with the free flow of commerce and are not made the subject of regulation by Congress. They are not forbidden under Article 1, Section 8, Clause 3 of the United States Constitution.

In the *Wilmington Transportation Company vs. California Railroad Commission*, 236 U. S. 151, Justice, now Chief Justice, Hughes, held that ferriage rates between Avalon Island and Long Beach in the state of California could be established by the state until such time as Congress may intervene by a direct prohibition. Under the authority of this case it would be competent for the state to establish a rate for the towing of logs between Olympia and Everett, for instance. It would seem that if we are entitled to regulate the rates that may be charged for the transportation of products from one port in the state to another, that a very much greater reason would exist for regulating the safety of the vessel with reference to seaworthiness of the hull, its propelling machinery, the maintenance of an adequate crew at all times to safely operate the vessel with reference to other traffic lawfully upon the inland waterways. See also *Gloucester Ferry Co. vs. Pennsylvania*, 14 U. S. 196, 214.

Morgan Steamship Co. vs. Louisiana Board of Health, 118 U. S. 455;

Transportation Company vs. Parkersburg, 107 U. S. 691;

Packet Co. vs. Catlettsburg, 105 U. S. 559;

Pittsburg & Southern Coal Company vs. Louisiana, 156 U. S. 590.

The fee prescribed in section 26 of the disputed act (See Appendix "A", page 54) is obviously not a fee for license, but a fee for inspection. The fee

is paid for a police service in connection with the regulation of the harbor traffic. The propriety of an exaction of this character levied under the authority of a state statute is fully established by the cases which we have cited herein. There is no provision in Chapter 200 of the Laws of Washington, 1907, which provides for the licensing of any of these vessels but they do have to pay a fee for inspection.

POINT "B"

The State Has Concurrent Jurisdiction With the Federal Government to Regulate Navigation and Commerce in Matters Primarily of Local Concern and in the Absence of Federal Legislation the State May Legislate Upon the Subject-Matter.

In the early case of *Gibbons vs. Ogden*, 22 U. S. 1, 6 Law Ed. 23, the power of the state to exercise *controlling supervision of navigable waters and the* vessels plying thereon within its jurisdiction was recognized in matters primarily of local concern. Chief Justice Marshall observed that this power had its origin in its police power, which resides in all sovereignty to regulate in matters concerning the peace, health, safety and morals of its citizens. In the case of *Cooley vs. Board of Port Wardens*, 53 U. S. 298, it was said that this power to legislate on matters of navigation and commerce did not solely originate in the police power, but was inherent in the sovereign. The rule has been consistently sustained by this court.

Wilmington Transportation Company vs. California Railroad Commission, 236 U. S. 151;

Stewart & Co. v. Rivara, 274 U. S. 614;

Minnesota Rate Cases, 230 U. S. 400;

Vandalia Railroad Co. v. Public Cervice Commission of Indiana, 242 U. S. 255;

Steamboat New York v. Rea, 59 U. S. 223;

Morgan v. Louisiana, 118 U. S. 455;

Cornell Steamboat Co. v. Sohmer, 235 U. S. 549.

POINT "C"

A Reasonable Fee Levied by the State Authorities to Defray Cost of Inspection of Vessels in Connection With Regulation of Local Traffic Does Not Constitute an Unlawful Burden Upon Interstate Commerce.

This principle was established in the case of *Cooley vs. Board of Port Wardens of Phila.*, 53 U. S. 298, and has been sustained in many other cases in this court.

In the case of *Clyde Mallory Lines vs. State of Alabama*, 296 U. S. 261, 56 Sup. Ct. Rep. 194, at 195:

"The supreme court of Alabama found that the contested fee was a charge made for the policing of the harbor under the rules adopted by the appellee to insure the safety of vessels and the dispatch of shipping within the port by regulating the speed of vessels, their movements and anchorage and by providing for their protection from danger of fire occasioned by the uncontrolled discharge of oil into the harbor."

At page 197:

"The present fee to defray the cost of a purely local regulation of harbor traffic is not an objectionable burden on commerce. State regulations of harbor traffic although they incidentally affect commerce, interstate or foreign, are of local concern. So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress they are not forbidden. * * *."

POINT "D"

State Regulations of Harbor Traffic, Although They Incidentally Affect Commerce, Interstate or Foreign, Are of Local Concern and So Long as They Are Not Made the Subject of Regulation by Congress, They Are Not Forbidden as an Unlawful Burden Upon Interstate Commerce.

In the case of *Gloucester Ferry Company vs. Pennsylvania*, 114 U. S. 214, it is said:

"* * * But, independently of such measures, the State may prescribe regulations for the government of vessels whilst in its harbors; it may provide for their anchorage or mooring, so as to prevent confusion and collision; it may designate the wharves at which they shall discharge and receive their passengers and cargoes, and require their removal from the wharves when not thus engaged, so as to make room for other vessels. It may appoint officers to see that the regulations are carried out, and impose penalties for refusing to obey the directions of such officers; and it may impose a tax upon vessels sufficient to meet the expenses attendant upon the execution of the regulations. The authority for establishing regulations of this character is found in the right and duty of the supreme power of the State to provide for the safety, convenient use and undisturbed enjoyment of property within its limits; and charges incurred in

enforcing the regulations may properly be considered as compensation for the facilities thus furnished to the vessels. * * *."

In the case of *Burrows vs. Delta Transportation Company*, a decision of the supreme court of Michigan reported at 64 N. W. 501, 106 Mich. 582, the Delta Transportation Company owned a steamboat which operated upon navigable waters in the State of Michigan. The state law required a fire screen over its smokestack. This boat by reason of its failure to maintain such a screen set fire to the lumber piled along the bank of the river. The owner of the lumber sued the boat operator for damages. It was claimed that the statute requiring the fire screen was void because it constituted an invasion of the exclusive power of the Federal government to regulate matters of navigation and commerce.

The court said on page 594 of the Michigan report:

"* * * The principle has received abundant adjudication that the state may exercise its power to make regulations for the protection of the health, the lives, and the property of the people of the state against the dangers arising under interstate transportation and commerce, concurrent with the laws passed by Congress in the exercise of the jurisdiction of Congress over the same subjects, and that the laws of the state are valid and may be enforced so long as they do not conflict with the provisions of federal legislation. *King v. Transportation Co.*, 1 Flip. 1, Fed. Cas. No. 7,787; *City of New York v. Miln*, 11 Pet. 102, 12 Curt. Dec.

357; *Transportation Co. v. Gagnon*, 36 Fed. 123; *Johnson v. Elevator Co.*, 119 U. S. 388, at pages 399, 400, 7 Sup. Ct. 254; *Transportation Co. v. City of Parkersburg*, 107 U. S. 691, at pages 700-707, 2 Sup. Ct. 732; *County of Mobile v. Kimball*, 102 U. S. 691; *Huse v. Glover*, 119 U. S. 543, 7 Supt. Ct. 313; *Sands v. Improvement Co.*, 123 U. S. 288, 8 Sup. Ct. 113; *Morgan, etc., S. S. Co. v. Board of Health*, 118 U. S. 455, 6 Sup. Ct. 1114; *Sherlock v. Alling*, 93 U. S. 99; *Harrigan v. Lumber Co.*, 129 Mass. 580; *People v. Jenkins*, 1 Hill, 469; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564."

It is interesting to note that the boat involved in the Michigan case was a steamer subject to inspection by the Federal government under the Steamboat Inspection Law, one of a class of vessels over which the State of Washington under Chapter 200, Laws of 1907, makes no claim of jurisdiction. We seek to apply our law only to those vessels which are not inspected by the Federal government.

In the case of *Leisy v. Harden*, 135 U. S. 100, page 117, it is said:

"* * * The controlling and supreme power over commerce with foreign nations and the several states is undoubtedly conferred upon Congress. Yet, in my judgment, the State may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress.'"

In the case of *Sinnot vs. Davenport*, 63 U. S. 227, the court said:

"We agree that in the application of this principle, the supremacy of an act of the Congress in a case where the state law is but an exercise of the reserve power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together. * * *"

It is true that in the application of the rule in the *Sinnot* case, the court held the statute of Alabama to be void because it conflicted directly with the provisions of Congress relating to enrollment and registration. See also:

Clyde Mallory Lines vs. State of Alabama, 296 U. S. 261;

Sherlock vs. Alling, 93 U. S. 91;

Gilman vs. Philadelphia, 70 U. S. 713;

Atlantic Coast Line vs. Georgia, 234 U. S. 280, 293.

Hennington vs. Georgia, 163 U. S. 299.

The rule of law enunciated in these cases definitely establishes the error of the supreme court of the State of Washington in holding that the provisions of the questioned law constitute a burden upon interstate commerce.

POINT "E"

Chapter 200 of the Laws of Washington of 1907 Does Not Interfere With the Uniformity of Maritime Law.

Congress, by vesting broad authority in the local steamboat inspectors, Section 4438, Rem. Rev.

Stat., title 52, Regulation of Steam Vessels, Appendix "B" of page 62, has itself recognized that the matter of regulating the various vessels in the different harbors of the country constitute a problem which is essentially local in character. These provisions, however, apply only to steam vessels. The Department of Commerce was given power to promulgate rules and regulations providing for the licensing of officers on certain boats, the number of men constituting the crew, the qualifications for engineers, masters and pilots for boats of different tonnages. All these matters are provided for in the rules and regulations of the Board of Supervising Inspectors and authority was delegated to the local inspectors who, under the rules of Section 4463, U. S. Rev. Stat., Title 63, have authority in the premises in each of the several harbors of the United States. These officers exercise broad general supervisory powers with reference to boats other than motor-driven tugs engaged in towing for hire. If such matters are to be regulated by local inspectors as to vessels over which Congress has exercised its powers, the regulations in question of a similar character are subjects of local concern suitable for the exercise of state power upon vessels not covered by the Federal regulations.

Uniformity in the matter of the regulation of harbor traffic is neither possible nor desirable. It is true that the Federal government has legislated with reference to navigation applicable to the mo-

tor tugs in question and has regulated the matter of life preservers and life-saving equipment.

It is also true that the Federal government has not provided for any inspection of hull, for seaworthiness, fitness of mechanical equipment, hours of employment, the number of personnel of the crew, for safety, sanitation of quarters and the inspection of vessels at regular intervals for the purposes aforesaid. In the case of *Savage vs. Jones*, 225 U. S. 501, it is said:

"The most that can be said is that inquiries have been made, but that Congress has not yet decided to establish regulations, either directly or through its subordinate body, as to the appliance in question. The intent to supersede the exercise of the State's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken."

If we follow this rule it cannot be inferred, because Congress has circumscribed its field and restricts its supervision of these boats to the inspection of life preservers, lights carried by the boat and the provisions requiring the vessels to carry copies of the rules and regulations with respect thereto, properly posted, that it was intended that the field hereinbefore referred to, entirely unoccupied by the Federal government, should not be governed by state legislation.

It is therefore our contention that this statute, properly interpreted, deals with matters substantially and inherently of local concern. That the

Federal government has definitely restricted and limited the field within which it chose to legislate; that the police power of the State of Washington is ample to control the remainder of the field in the absence of contrary provisions by the Congress. The issues involve a Federal question. There is a vast field in which Congress has not legislated. The controlling question clearly is whether or not the state has any power to legislate concerning boats engaged in towing for hire in purely intra-state transactions where the Federal government has provided no regulations of the field which the state has attempted to supervise and regulate.

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APPENDIX "A"

CHAPTER 200.

Regulation of Steam Vessels, Etc.

SEC. 9843. *Commissioner of Labor to Enforce.*—The commissioner of labor shall be charged with the administration of the provisions of this act, shall employ the necessary inspectors to enable him to carry said provisions into effect, and shall exercise supervision over them in the performance of their duties. (Chap. 200, L. '07, p. 425, Sec. 1.)

SEC. 9844. *Inspection of Vessels—Investigation of Accidents.*—The commissioner of labor shall annually, or oftener if he has good cause to believe it reasonable, inspect or cause to be inspected, every steam vessel or other vessel operated by machinery engaged in carrying passengers for hire or towing for hire, *except vessels which are subject to inspection under the laws of the United States,* examine carefully her hull, boats and other equipment, examine her engine and boilers, ascertain how long it will be safe to use the same, determine the pressure of steam to be allowed and so regulate the fusible plugs, safety valves and steam-cocks as to insure safety, and he may require such changes, repairs and improvements to be adopted and used as he may deem expedient for the contemplated route. He shall also fix the number of passengers that may be transported. He shall also, whenever he deems it expedient, visit any vessel licensed under this act and examine into her condition for the purpose of ascertaining whether or not any party thereon having a certificate from him has conformed to and obeyed the conditions of such certificate and the provisions of this act. The owner, master, pilot, captain or engineer of such vessel shall answer all reasonable questions, and shall give all the information in his or their power, in regard to said vessel, her machinery and the manner of managing the same.

In case of damage by fire or explosion or by means of an electrical apparatus, he may investigate the cause thereof, and if found by him to have been occasioned by a violation of any of the provisions of this act, or of the orders, regulations and requirements issued by him, he

shall so certify to the prosecuting attorney of the county where such violation occurred, together with the names of the persons guilty thereof and of the witnesses. (L. '07, p. 425, Sec. 2.)

SEC. 9845: *Boiler Tests—Inspection of Launches.*—The commissioner shall also test the boilers of all steam vessels, before the same shall be used, and at least once in every year thereafter. In subjecting to the hydrostatic test, boilers called and usually known under the designation of high pressure boilers, the hydrostatic pressure applied must be in proportion of one hundred and fifty pounds to the square inch to one hundred pounds to the square inch of the steam pressure allowed. And in subjecting to the hydrostatic test, that class of boilers usually designated and known as low pressure boilers, the commissioner shall allow as the working power of each new boiler, a pressure of only three-fourths the number of pounds to the square inch, to which it shall have been subjected by the hydrostatic test, and found to be sufficient therefor; but should said commissioner be of the opinion that such boiler, by reason of its construction or material will not safely allow so high a working pressure he may, for reasons specifically stated in his certificate, fix the working pressure of such boiler at less than three-fourths of said test pressure; and no boiler or pipe, or any of the connections therewith, shall be approved, which is made in whole or in part, of bad material, or is unsafe in its form, or dangerous from defective workmanship, age, use or other cause. In addition to the hydrostatic test as herein provided, the commissioner may cause a hammer test to be made and an internal examination of such boiler or boilers so tested, whenever deemed necessary. Any boiler having been in use ten years or more may be drilled at the bottom of shell or boiler, and also at such other points as the inspectors may direct to determine the thickness of such material at those points, and the general condition of such boiler or boilers at the time of inspection and the steam pressure allowed shall be determined by such ascertained thickness and general condition of the boiler. He shall also see that all connections to the said boiler or engines are of suitable material, size and construction; and that the boiler, machinery and appurtenances are such as may be employed with safety in the service to be performed.

He shall also satisfy himself that the safety valves are of suitable dimensions and that the weights of the same are properly adjusted, so as to allow no greater pressure than the maximum amount prescribed by him; and that there is a sufficient number of gauge cocks, properly attached to the boiler, so as to indicate the quantity of water therein; and suitable steam gauges to correctly show the amount of steam carried; and as to any other matter connected with such steam vessel or the machinery thereof, that to said commissioner shall seem necessary to safety of her passengers and crew. And he shall make such inspection, examination and test of naphtha launches and electric launches and their apparatus and machinery, as will enable him to determine whether they can be safely used in navigation. (L. '07, p. 426, Sec. 3.)

SEC. 9846. *Certificate of Inspection.*—The commissioner, if satified that such vessel is in all respects safe and conforms to the requirements of this act, shall make and subscribe duplicate certificates, setting forth the age of the vessel, the date of inspection, the name of the vessel, the name of the owner, the master, the number of licensed officers and crew which he deems necessary to manage the vessel with safety, the number of boats and life-preservers required, and the number of passengers that she can safely carry, and if a steam vessel, the age of the boiler, and the pressure of steam she is authorized to carry. One of such certificates shall be kept posted in some conspicuous place on the vessel to be designated by the commissioner in the certificate and the other copy shall be kept by the commissioner and by him recorded in a book to be kept for that purpose. If the commissioner refuses to grant a certificate of approval, he shall make a statement in writing, giving his reasons for such refusal, and deliver the same to the owner or master of the vessel. (L. '07, p. 427, Sec. 4.)

SEC. 9847. *Number of Passengers.*—No greater number of passengers shall be transported upon any licensed steam vessel or other vessel included within the provisions of this act, than the number allowed in the certificate of such vessel, under a penalty of ten dollars, to be paid by the master for each passenger in excess of the allowed number, unless special permission is first

obtained from the commissioner under such precautions as he deems expedient. (L. '07, p. 428, Sec. 5.)

SEC. 9848. *Protection of Woodwork Against Fire.*—All steamboats and other vessels to which this act is applicable, shall hereafter be so constructed that the woodwork about the boilers, chimneys, fireboxes, cookhouses, stove and steam pipes, or any machinery or apparatus involving danger of fire, where such woodwork is exposed to ignition, shall be so shielded by some incombustible material, that the air may circulate freely between such material and woodwork or other ignitible substances, and before granting a certificate of inspection, the commissioner shall require that all other necessary provisions be made throughout such vessel, as he may judge expedient to guard against loss or damage by fire. (L. '07, p. 428, Sec. 6.)

SEC. 9849. *Stairways and Gangways.*—Every vessel engaged in carrying passengers, shall be provided with permanent stairways and other sufficient means convenient for passing from one deck to the other, with gangways large enough to allow persons freely to pass, which shall be open fore and aft of the length of the vessel, and to and along the guards; and whoever obstructs such gangways by freight or otherwise shall forfeit fifty dollars to the state of Washington for every such violation. (L. '07, p. 428, Sec. 7.)

SEC. 9850. *Rules for Navigation of Vessels.*—From and after the passage of this act, the following rules shall be observed in navigating all steam vessels when under steam, and all boats propelled by machinery on *the waters within the jurisdiction of the state, excepting the waters which are under the jurisdiction of the United States:* * * * (L. '07, p. 429, Sec. 8.)

In view of the restrictive language used in the first paragraph of this section, the eighteen subdivisions have been omitted in the interests of brevity.

SEC. 9851. *Lights.*—The master of every steamboat or vessel propelled by machinery when navigating between sunset and sunrise, shall cause the same to carry the following lights:

(1) At the foremast head, a bright light of such a character as to be visible on a dark night, with a clear

atmosphere at a distance of at least two miles; and be so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, and to be fixed so as to throw the light ten points on each side of the vessel from right ahead to two points abaft the beam on either side.

(2) On the starboard side a green light of such a character as to be visible on a dark night, with a clear atmosphere at a distance of at least two miles; and be so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side.

(3) On the port side a red light of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the port side. The green and red lights shall be fitted with inboard screens, projecting at least three feet forward from the lights, so far as to prevent them from being seen across the bow.

(4) The master of every vessel other than a steamboat anchored in the night-time shall cause her peak to be lowered and a good and sufficient light to be thrown from her taffrail in some part of her rigging and at least twenty feet above her deck. In the case of small vessels, the commissioner may make specific rules for lights different from the foregoing. (L. '07, p. 431, Sec. 9.)

* * * * * * *

SEC. 9854. *Life-Preservers—Buckets and Axes.*—Every steam vessel or vessel propelled by machinery used in the transportation of passengers for hire, shall have a life-preserver or life-float for each passenger she is allowed to carry and for each member of her crew. At least one-half thereof shall be life-preservers of the sort prescribed by the supervising inspector appointed under this act, and the other half or part thereof may be life-floats, to be constructed of dry pine plank, four feet long, two inches thick and twelve inches wide, with lines properly attached in such manner as to be convenient for use; and it shall be the duty of the commissioner to satisfac-

torily ascertain that every life-preserver and such life-floats are as herein required. Such life-preservers and life-floats shall be kept in convenient accessible places in such vessel in readiness for immediate use in case of accident, and the places where the same are to be kept shall be designated in the commissioner's certificate, and also pointed out by printed notices posted in such places as the commissioner directs. Every such vessel shall carry in convenient places, at least ten buckets filled with water, with dip lines attached, and three axes in good condition, but the inspectors may, if they deem it necessary or proper, require a larger, or in case of very small vessels, permit a smaller number of buckets and axes. (L. '07, p. 433, Sec. 12.)

SEC. 9855. *Obstruction of Safety Valves, etc., Prohibited—Penalty.*—Whoever intentionally loads or obstructs, or causes to be loaded or obstructed, in any way, the safety valve of the boiler, or employs any other means or device whereby the boiler may be subjected to a greater pressure than the amount allowed by the commissioner's certificate, or intentionally deranges or hinders the operation of any machinery or device employed to denote the state of the water or steam in any boiler, or to give warning of any approaching danger, or intentionally permits the water to fall below the prescribed low water limit of the boiler, shall forfeit to the state of Washington the sum of five hundred dollars for each violation. (L. '07, p. 434, Sec. 13.)

SEC. 9856. *Examination for License as Master, Pilot and Engineer.*—Every person employed as master, pilot or engineer on board of a steam vessel or a vessel propelled by machinery, carrying passengers for hire or towing for hire, shall be examined by the commissioner as to his qualifications, and if satisfied therewith he shall grant him a license for a term of one year for such boat, boats or class of boats as said commissioner may specify in such license. In a proper case, the license may permit and specify that the master may act as pilot, and in case of small vessels also as engineer and pilot. The license shall be framed under glass, and posted in some conspicuous place on the vessel on which he may act. Whoever acts as master, pilot or engineer, without having first received such license, or upon a boat or class of

boats not specified in his license, shall be liable to a penalty of fifty dollars for each day that he so acts, except as in this act otherwise specified, and such license may be revoked by the commissioner for intemperance, incompetency or wilful violation of duty. (L. '07, p. 434, Sec. 14.)

SEC. 9857. *Standard Quality of Oil, to Be Used in Lights.*—No licensed vessel carrying passengers for hire shall be allowed to use in lamps, lantern or other lights on such vessels, any oil which will not stand a fire test of at least three hundred degrees Fahrenheit. (L. '07, p. 434, Sec. 15.)

SEC. 9858. *Name and Home Port on Stern.*—Every vessel subject to the provisions of this act, shall have her name and port to which she belongs painted on her stern on a black background in white, yellow or gilt letters, or on a white background in black, yellow or gilt letters of not less than three inches in length. If any vessel, which is subject to the provisions of this act, shall be found without having her name, and the name of the port to which she belongs so painted, the owner or owners shall be liable to a penalty of fifty dollars to the state of Washington. The commissioner may, however, in the case of small vessels, permit such name to be placed elsewhere and in letters of less length, the permission, the place of the name and length of letters to be stated in a certificate to be given to the master, who shall exhibit the same whenever requested. (L. '07, p. 435, Sec. 16.)

SEC. 9859. *Landing Passengers in Small Boats.*—Small boats containing passengers may be landed from or drawn to a steamboat by means of a line hauled in by hand, but in no case shall the line be attached to or hauled in by the machinery of any vessel. No passenger shall be put or suffered to go into any such small boat for the purpose of being landed until such small boats shall be completely afloat and wholly disengaged from the vessel, except held by a painter. A good and sufficient pair of oars suitable for the purpose shall be kept in such small boat. In landing or receiving any passenger in the nighttime, there shall be a signal from the small boat at the shore by means of a horn or trumpet, to enable those having charge on board the vessel to determine when the

small boat, having landed or received her passengers, is ready to leave the shore. (L. '07, p. 435, Sec. 17.)

SEC. 9860. *Same—Engines to be Stopped.*—While landing or receiving passengers the engine of the vessel shall not be put in motion except:

(1) To give sufficient force to carry the small boat to the shore, or,

(2) To keep the vessel in proper direction and to prevent her from drifting or being driven on shore; but in no case shall it be put in motion while passengers are being transferred from such vessel into a small boat for the purpose of being landed. (L. '07, p. 435, Sec. 18.)

SEC. 9861. *Regulation as to Carrying Combustibles.*—No loose hay, loose cotton or loose hemp, camphene, nitro-glycerine, naphtha, benzine, benzole, coal oil, crude petroleum or other like explosive burning fluids or dangerous articles, shall be carried as freight or used in stoves on any steamer or vessel licensed to carry passengers under this act; * * * (L. '07, p. 436, Sec. 20.)

SEC. 9863. *Penalty.*—Every master of a steamboat or vessel who shall violate any of the preceding sections of this act shall, for every such violation, forfeit to the state of Washington the sum of two hundred and fifty dollars, unless a different penalty is prescribed. (L. '07, p. 436, Sec. 21.)

SEC. 9864. *Liability of Owner of Vessel for Misconduct of Master.*—The owner of every steamboat or vessel shall be responsible for the good conduct of the master employed by him, and if any penalty incurred by such master is not paid by him and cannot be collected from him by due course of law, it may be recovered of the owner or owners, jointly or severally, of the steamboat or vessel in whose employ he was at the time of the incurring of such penalty, in the same manner as if such owner or owners were sureties of such master. (L. '07, p. 436, Sec. 22.)

SEC. 9865. *Copy of Act Shall be Posted.*—The master of every vessel shall keep a copy of the preceding sections of this act posted in a conspicuous place on such vessel for the inspection of all persons on board thereof. Every master violating the provisions of this section shall

forfeit to the state of Washington, twenty-five dollars, and the additional sum of twenty-five dollars for each month such violation continues. (L. '07, p. 437, Sec. 23.)

SEC. 9866. *Commissioner's Report to Governor.*—The commissioner shall on or before the 1st day of January in each year, make a verified report to the governor containing a detailed statement of the names and number of vessels examined and licensed, the names and number of vessels to which licenses were refused and stating the reasons for the refusal, the names and number of persons examined and licensed, the names and number to whom licenses were refused and stating the reasons therefor, and may include in such report any other information he may deem desirable. (L. '07, p. 437, Sec. 24.)

SEC. 9867. *Penalty for Noncompliance With Act—Renewal of Certificate, etc.—Requirements of Launches Navigating the Straits.*—All steam vessels, naphtha, gasoline and electric launches, or any craft propelled by machinery, carrying passengers for hire, or towing for hire must comply with all the terms and provisions of this act, and with all orders, regulations and requirements of the commissioner except that any such vessel not propelled by steam, or when not under steam, is exempt from the provisions in regard to the blowing of whistles. If any such vessel is navigated without complying therewith, except as herein stated, or without the requisite certificates of the commissioner, the owners and masters shall forfeit to the state of Washington the penalties prescribed in this act, and the vessel so navigated shall also be liable therefor, and may be attached and proceeded against in any court having jurisdiction. But if any such vessel is deprived of the services of any licensed officer, without the consent, fault or collusion of the master, owner or any person interested in the vessel, the deficiency may be temporarily supplied, until a licensed officer can be obtained. If the owner or master of any vessel shall at least twenty days before the expiration of his certificate notify the commissioner of such expiration and request a new inspection and certificate, the certificate then expiring shall continue in force until an inspection is made and such owners and masters are not liable for any of the penalties provided in this act on account of navigating said vessel, without such new cer-

tificate. No launch under ten tons carrying passengers shall navigate the waters of the straits of Juan de Fuca, unless provided with a boat of sufficient size to accommodate said passengers and be under the management of a person holding a United States license for steam vessels. (L. '07, p. 437, Sec. 25.)

SEC. 9868. *Fees.*—For each inspection provided for in sections 9844 and 9845 the owner or master of each vessel shall pay the commissioner of labor an inspection fee, which shall not be less than five dollars, nor more than twenty dollars, to be fixed by the commissioner of labor with reference to the size of the vessel inspected. For each license issued under section 9860 of this act the person so licensed shall pay to the commissioner of labor the sum of five dollars. All of the fees received from this source shall be accounted for by the commissioner of labor to the state treasurer, and credited to the general fund. (L. '07, p. 438, Sec. 26.)

SEC. 9869. *Compensation of Inspectors.*—The inspectors provided for in this act shall receive seven dollars per diem for the time actually engaged in making the inspections and examinations provided for herein, and shall be paid necessary traveling expenses, when making such inspections and conducting such examinations at other than the domicile of said inspectors. (L. '07, p. 438, Sec. 27.)

SEC. 9870. *Authority of Inspectors.*—Any inspector duly employed by the commissioner of labor for the execution of any of the provisions of this act, shall be deemed to be a deputy of said commissioner for the purposes hereof, and may perform any act and exercise any authority herein prescribed for the commissioner of labor. (L. '07, p. 438, Sec. 28.)

APPENDIX "B"

TITLE 46—SHIPPING.

U. S. C. A. CHAPTER 14.

Vessels Subject to Inspection and Regulation

SEC. 362. *Vessels Subject to Provisions of Chapter; Reciprocal Acceptance of Foreign Certificates of Inspection; Fees.*—All steam vessels navigating any waters of the United States which are common highways of commerce or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this and the following chapter and sections 214 and 215.

And all foreign private steam vessels carrying passengers from any port of the United States to any other place or country shall be subject to the provisions of sections 391, 392, 399 to 402, inclusive, 463 to 466 inclusive, 472, 475, 481, 494, 495, 497, and 498, and shall be liable to visitation and inspection by the proper officer, in any of the ports of the United States, respecting any of the provisions of the sections aforesaid: *Provided, however*, That when such foreign passenger steamers belong to countries having inspection laws approximating those of the United States, and having unexpired certificates of inspection issued by the proper authorities in the respective countries to which they belong, they shall be subject to no other inspection than necessary to satisfy the local inspectors that the condition of the vessel, her boilers, and life-saving equipments are as stated in the current certificate of inspection; but no such certificate of inspection shall be accepted as evidence of lawful inspection except when presented by steam vessels of other countries which have by their laws accorded to the steam vessels of the United States visiting such countries the same privilege accorded to the steam vessels of such countries visiting the United States; it being further provided that there shall be collected and paid into the Treasury of the United States the same fees for the inspection of foreign passenger steamers carrying passengers from the United States that any foreign nation shall

charge the merchant vessels of the United States trading to the ports of such nationality; it being further provided that the Secretary of Commerce shall have the power to waive at any time the collection of such fees upon due notice of the proper authorities of any country concerned that the collection of fees for the inspection of American steam merchant vessels has been discontinued.

It is further provided that the Secretary of Commerce may, in his discretion, permit any foreign passenger steamer coming within the provisions of this section whose foreign certificate of inspection shall have expired at sea since last leaving the country to which said vessel belongs, or while said vessel shall have been in a port of the United States, to sail upon her regular route without undergoing any further inspection than would have been required had said foreign certificate of inspection been in force: *Provided, however,* That such discretion shall be exercised only with respect of vessels operated upon regularly established lines, and in cases where such foreign passenger steamers will be regularly inspected by the authorities of her home government before her next return to a port of the United States. (R. S. Sec. 4400; Aug. 7, 1882, c. 441, Sec. 1, 22 Stat. 346; Mar. 1, 1895, c. 146, Sec. 1, 28 Stat. 699; Feb. 15, 1902, c. 23, 32 Stat. 34; Mar. 17, 1906, c. 955, Sec. 1, 34 Stat. 68; Mar. 4, 1913, c. 141, Sec. 1, 37 Stat. 736.)

* * * * * * *

TITLE 46—SHIPPING.

SEC. 364. *Vessels Navigating Coastwise and on Great Lakes.*—All coastwise seagoing vessels, and vessels navigating the Great Lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam vessels in passing, as provided by this and the following chapter; and every coastwise seagoing steam vessel subject to the navigation laws of the United States, and to the rules

and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. (R. S. Sec. 4401.)

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Mode, Manner, and Extent of Inspection: Certificates: Records.

SEC. 391. *Hulls and Equipments; Exemption of Vessels; Enforcement of Requirements.*—The local inspectors shall, once in every year, at least, carefully inspect the hull of each steam vessel within their respective districts, and shall satisfy themselves that every vessel so submitted to their inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for passengers and the crew, and is in a condition to warrant the belief that she may be used in navigation as a steamer, with safety to life, and that all the requirements of law in regard to fires, boats, pumps, hose, life preservers, floats, anchors, cables, and other things are faithfully complied with; and if they deem it expedient they may direct the vessel to put in motion, and may adopt any other suitable means to test her sufficiency and that of her equipment. The local inspectors shall, once in every year, at least, carefully inspect the hull of each sail vessel of over seven hundred tons carrying passengers for hire and all other vessels and barges of over one hundred tons burden carrying passengers for hire within their respective districts, and shall satisfy themselves that every such vessel so submitted to their inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in condition to warrant the belief that she may be used in navigation with safety to life: *Provided,* That vessels while laid up and dismantled and out of commission may, by regulations established by the board of supervising inspectors, with the approval of the Secretary of Commerce, be exempted from any or all inspection under this section and sections 392, 404, and 405. Whenever any inspector or assistant inspector shall, in the performance of his duty, find on board any vessel subject to the provisions of this and the following chapter, as part of the required equipment

thereof, any equipment, machinery, apparatus, or appliances not conforming to the requirements of law, he shall require the same to be placed in proper condition by the owner or master of the said vessel, if possible; and if said inspector or assistant inspector shall find on board any such vessel any life preservers or fire hose so defective as to be incapable of repair, he shall require that the same be destroyed in his presence by such owner or master. And in any of the foregoing cases local inspectors by whom or under whose supervision said vessel is then being inspected shall have power to enforce the foregoing requirements by revoking the certificate of the said vessel, and by refusing to issue a new certificate to the said vessel until the said requirements shall have been fully complied with or until such action of the local inspectors shall have been reversed, modified, or set aside by the supervising inspector of the district on proper appeal by the owner or master of said vessel, which appeal shall be made to the said supervising inspector within ten days after the final action as aforesaid by the local inspectors; and upon such appeal, duly made, the supervising inspector shall have power to affirm, modify, or set aside such action by the local inspectors. (R. S. Sec. 4417; Dec. 21, 1898, c. 29, Sec. 4, 30 Stat. 765; Mar. 3, 1905, c. 1454, Sec. 1, 33 Stat. 1023; Mar. 4, 1913, Sec. 1, c. 141, 37 Stat. 736.)

* * * * * * *

SEC. 392. *Boilers and Appurtenances.*—The local inspectors shall also inspect the boilers and their appurtenances in all steam vessels before the same shall be used, and once at least in every year thereafter, and shall subject all boilers to the hydrostatic pressure. All such vessels shall comply with the following requirements, namely: That the boilers are well made, of good and suitable material; that the openings for the passage of water and steam, respectively, and all pipes and tubes exposed to heat, are of proper dimensions and free from obstructions; that the spaces between and around the flues are sufficient; that flues, boilers, furnaces, safety valves, fusible plugs, low-water indicators, feed-water apparatus, gauge cocks, steam gauges, water and steam pipes connecting boilers, means of prevention of sparks and flames from fire doors, low-water gauges, means of removing mud and sediment from boilers, and all other

such machinery and appurtenances thereof, are of such construction, shape, condition, arrangement, and material that the same may be safely employed in the service proposed without peril to life; and the local inspectors shall satisfy themselves by thorough examination that said requirements of law and regulations in regard thereto have been fully complied with. All boilers used on steam vessels and constructed of iron or steel plates, inspected under the provisions of section 408, shall be subjected to a hydrostatic test, in the ratio of one hundred and fifty pounds to the square inch to one hudred pounds to the square inch of the working steam power allowed. No boiler or flue pipe, nor any of the connections therewith, shall be approved, which is made, in whole or in part, of bad material, or is unsafe in its form, or dangerous from defective workmanship, age, use, or other cause. (R. S. Sec. 4418; June 19, 1886, c. 421, Sec. 14, 24 Stat. 82; Mar. 3, 1905, c. 1456, Sec. 1, 33 Stat. 1027.)

* * * * * * * * *

SEC. 404. *Inspection of Ferryboats, Canal Boats, and Small Craft; Regulations; Licenses.*—The hull and boilers of every ferryboat, canal boat, yacht, or other small craft of like character, propelled by steam, shall be inspected under the provisions of this chapter. Such other provisions of law for the better security of life as may be applicable to such vessels shall, by the regulations of the board of supervising inspectors, also be required to be complied with before a certificate of inspection shall be granted, and no such vessel shall be navigated without a licensed engineer and a licensed pilot: Provided, however, That in open steam launches of ten gross tons and under, one person if duly qualified, may serve in the double capacity of pilot and engineer. All vessels of above fifteen gross tons carrying freight or passengers for hire, but not engaged in fishing as a regular business, propelled by gas, fluid, naphtha, or electric motors, shall be subject to all the provisions of this section relating to the inspection of hulls and boilers and requiring engineers and pilots, and for any violation of the provisions of this or the following chapter or sections 214 or 215 applicable to such vessels, or of rules or regulations lawfully established thereunder, and to the extent to which such provisions of law and regulations are so applicable, the said

vessels, their masters, officers, and owners shall be subject to the provisions of sections 494 to 498, inclusive, relating to the imposition and enforcement of penalties and the enforcement of law. All vessels of fifteen gross tons or less propelled in whole or in part by gas, gasoline, petroleum, naphtha, fluid, or electricity, and carrying passengers for hire, shall carry one life preserver, of the sort prescribed by the regulations of the board of supervising inspectors, for every passenger carried, and no such boat while so carrying passengers shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors. No examination shall be required as a condition of the obtaining of such a license, and any such license shall be revoked or suspended by the local board of inspectors for misconduct, gross negligence, recklessness in navigation, intemperance, or violation of law on the part of the holder, and if revoked, the person holding such license shall be incapable of obtaining another such license for one year from the date of revocation. (R. S. Sec. 4426; Dec. 22, 1890, c. 26, 26 Stat. 692; Mar. 3, 1905, c. 1457, Sec. 4, 33 Stat. 1029; May 16, 1906, c. 2460, 34 Stat. 193.)

* * * * * * * *

SEC. 405. *Tugboats and Freight Boats.*—The hull and boiler of every tugboat, towing boat, and freight boat shall be inspected, under the provisions of this chapter; and the inspectors shall see that the boilers, machinery, and appurtenances of such vessel are not dangerous in form of workmanship, and that the safety valves, gauge cocks, low-water alarm indicators, steam gauges, and fusible plugs are all attached in conformity to law; and the officers navigating such vessels shall be licensed in conformity with the provisions of chapter 11 and shall be subject to the same provisions of law, as officers navigating passenger steamers. (R. S. Sec. 4427.)

* * * * * * * *

SEC. 511. *"Motor Boats" Defined; Inspection.*—The words "motorboat" where used in this chapter shall include every vessel propelled by machinery and not more than sixty-five feet in length except tugboats and towboats propelled by steam. The length shall be measured from end to end over the deck, excluding sheer: *Provided,* That the engine, boiler, or other operating ma-

chinery shall be subject to inspection by the local inspectors of steam vessels, and to their approval of the design thereof, on all said motor boats, which are more than forty feet in length, and which are propelled by machinery driven by steam. (June 9, 1910, c. 268, Sec. 1, 36 Stat. 462.)

SEC. 515, Rem. Rev. Stat. *Life preservers; licenses.*—Every motor boat subject to any of the provisions of this chapter, and also all vessels propelled by machinery other than by steam more than sixty-five feet in length, shall carry either life preservers or life belts, or buoyant cushions, or ring buoys or other device, to be prescribed by the Secretary of Commerce, sufficient to sustain afloat every person on board and so placed as to be readily accessible. All motor boats carrying passengers for hire shall carry one life preserver of the sort prescribed by the regulations of the Board of Supervising Inspectors for every passenger carried, and no such boat while so carrying passengers for hire shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors. No examination shall be required as the condition of obtaining such a license, and any such license shall be revoked or suspended by the local board of inspectors for misconduct, gross negligence, recklessness in navigation, intemperance, or violation of law on the part of the holder, and if revoked the person holding such license shall be incapable of obtaining another such license for one year from the date of revocation: Provided, That motor boats shall not be required to carry licensed officers, except as required in this chapter. (June 9, 1910, c. 268, Sec. 5, 36 Stat. 463; Mar. 4 1913, c. 141, 37 Stat. 736.)

Title LII.—Regulation of Steam-Vessels.—Ch. I.

SEC. 4427. R. S.—The hull and boiler of every tug-boat, towing-boat, and freight-boat shall be inspected, under the provisions of this Title; and the inspectors shall see that the boilers, machinery, and appurtenances of such vessel are not dangerous in form or workmanship, and that the safety-valves, gauge-cocks, low-water alarm-indicators, steam-gauges, and fusible plugs are all attached in conformity to law; and the officers navigating such vessels shall be licensed in conformity with the

provisions of this Title, and shall be subject to the same provisions of law as officers navigating passenger-steamers.

* * * * * * *

SEC. 4438. The boards of local inspectors shall license and classify the masters, chief mates, engineers, and pilots of all steam-vessels. It shall be unlawful to employ any person, or for any person to serve as a master, chief mate, engineer, or pilot on any steamer, who is not licensed by the inspectors; and any one violating this section shall be liable to a penalty of one hundred dollars for each offense.

* * * * * * *

U. S. C. A., Title 28.

SEC. 344. *(Judicial Code, Section 237, Amended.) Appellate Jurisdiction of Decrees of State Courts; Certiorari.*— * * *

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. [redacted] 2

E. PAT KELLY, as Director of the Department of Labor and Industries of the State of Washington; JAY OLINGER, as Supervisor of the Safety Division of Said Department, and HOWELL PARKER, as Deputy of Said Department under the Title, Marine Inspector,

Petitioners,

VS.

STATE OF WASHINGTON on the Relation of FOSS COMPANY, INC., a corporation; ALLMAN-HUBBLE TUGBOAT COMPANY, INC., a corporation, *et al.*,

Respondents,

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENTS' BRIEF

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INDEX

Subject Index

	Page
STATEMENT OF THE CASE	1
SUMMARY OF RESPONDENTS' ARGUMENT	4
ARGUMENT	5
I. The Federal Government has the exclusive right to regulate vessels navigating waters over which the United States has jurisdiction, except as to matters purely local	5
II. The regulations sought to be imposed by petitioners are not within the class of local regulations on which the state may legislate until Congress acts	11
III. Even were it permissible for the state in the absence of congressional action to impose the regulations sought to be imposed, Congress has occupied the field to the exclusion of state regulation	19
IV. Regardless of this court's conclusion on the federal question, the judgment of the state court is right and should be affirmed	30
APPENDIX A	
Opinion of the Attorney General of Washington June 1, 1907	following page 42

Table of Cases

Boyd v. U. S., 116 U. S. 616	35
Chesapeake & Ohio R. R. Co. v. Stapleton, 279 U. S. 587	26
Cincinnati etc. Packet Co. v. Board of Trustees of Catlettsburg, 105 U. S. 559	10, 11
Citizens Bank v. Parker, 192 U. S. 73	35
Clyde Mallory Lines v. Alabama, 296 U. S. 261	9, 11

Page

Cooley v. Board of Port Wardens of Philadelphia, 12 How. 299 9
Corwin Investment Co. v. White, 166 Wash. 195 .. 42
Gibbons v. Ogden, 9 Wheat. 1 ..... 5, 9
Gilman v. Philadelphia, 3 Wall. 713 ..... 7, 11
Gilvary v. Cuyhoga Valley R. Co., 292 U. S. 57 26
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 5
Hall v. DeCuir, 95 U. S. 485 13
Harman v. Chicago, 147 U. S. 396 ..... 5, 18
Huntworth v. Tanner, 87 Wash. 670 32
International Shoe Co. v. Pinkus, 278 U. S. 261 26
Kansas City S. R. Co. v. Kan. Valley Drainage District, 223 U. S. 573 26
Missouri Pac. Ry. Co. v. Porter, 273 U. S. 341 25
Morgan v. Louisiana, 118 U. S. 455 10
Napier v. Atlantic Coast Line, 272 U. S. 605 26
Northern Cedar Co. v. French, 131 Wash. 394 42
Panama Refining Co. v. Ryan, 293 U. S. 388 40
Prigg v. Pennsylvania, 16 Pet. 539 ..... 24, 25, 26
Schechter v. United States, 295 U. S. 495 40
Smith v. Alabama, 124 U. S. 465 27
Southern R. Co. v. Railroad Commission, 236 U. S. 439 ..... 26, 28
Spokane & Eastern Trust Co. v. Young, 19 Wash. 122 ..... 32, 33
State ex rel. Ball v. Rathbun, 144 Wash. 56 ..... 33, 34
State ex rel. Cowles v. Shively, 63 Wash. 103 33
State ex rel. Leach v. Fishback, 79 Wash. 290 .... 33, 34
State ex rel. Makris v. Superior Court, 113 Wash. 296 40
State v. Northwestern Electric Co., 183 Wash. 184 40
State v. Powles & Co., 90 Wash. 112 42
Steamboat "New York" v. Rae, 18 How. 223 ..... 8, 11
The Winnebago, 205 U. S. 354 10
Union Insurance Co. v. Hoge, 21 How. 35 35

Page

Wilmington Transportation Co. v. R. R. Comm. of Cal., 236 U. S. 151 ..... 7, 11
Wm. Cushing v. Owners of Ship "John Frazier," 21 How. 184 ..... 8, 11

Table of Statutes

Acts of Congress:
Aug. 19, 1890, c. 802 §1 20
June 9, 1910, c. 268 22
Mar. 4, 1913, c. 141 §1 21
Mar. 4, 1915, c. 153 §10 20
Aug. 26, 1935, c. 697 24
Aug. 27, 1935, c. 747 24
May 20, 1936, c. 626 24
June 20, 1936, c. 628 ..... 21, 22, 24
June 23, 1936, c. 729 24
Statutes at Large:
26 Stat. 322 20
36 Stat. 462 22
37 Stat. 736 21
38 Stat. 1168 20
49 Stat. 868 24
49 Stat. 1542 24
49 Stat. 1544 ..... 21, 22
49 Stat. 1593 24
49 Stat. 1889 24
Revised Statutes:
R. S. Sec. 3 20
U. S. Code:
Title 1, §3 20
Title 33 19
Title 33 §76 20
Title 46 19
Title 46 § 4 21
Title 46 Chap. 16 22

Page

U. S. Code (Continued)
Title 46 §511 to 518 23
Title 46 §713 20
New York Laws:
1897 c. 592 36
1903 c. 420 37
1913 c. 765 39
New York Consolidated Laws:
1909—Navigation Law c. 37 ..... 37, 38
1916—Navigation Law c. 36 ..... 37, 38
Washington Laws:
1907 c. 142 §26 41
1907 c. 200 ..... 19, 23, 31

Miscellaneous Citations

Opinions of Atty. Gen. of Wash. 07-08 p. 136 31
Washington Senate Journal 1907 p. 812 38

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RESPONDENTS' BRIEF

STATEMENT OF THE CASE

Petitioners' "Statement of the Case," while not as comprehensive as might be desirable, is accepted as a statement of most of the essential facts. Such other facts as we feel should be called to the particular attention of the court, we refer to in the argument.

We do not, however, accept in entirety, petitioners' analysis of the questions involved.

We do not unqualifiedly accept petitioners' statement that the state legislature intended chapter 200 Laws of Washington 1907 to apply to federal waters. We believe there is grave doubt whether it so intended. Nor do we agree entirely with all the implications possibly arising from petitioners' statements that the act does not attempt to regulate respondents' vessels as such but that it regulates them only as they are engaged in the business of towing for hire. A distinction should be noted also in petitioners' use of the term "inland waters" of the state. The waters to which petitioners apply that term are not the land locked waters of the state over which we concede that the state has complete control, but the sounds, bays, inlets and rivers of the state which are open to the sea and which are within federal jurisdiction.

Petitioners' attempted enforcement of chapter 200 Laws of Washington 1907 as to respondents' vessels was an attempt to enforce on all waters within the territorial boundaries of the state all the provisions of the act, including such provisions as the act made for lights and pilot rules.

Petitioners now concede that they have no such authority, but do claim the right to inspect the hulls and machinery of motor tugs and require changes therein, license officers, fix the number of the operating personnel, prescribe safety equipment, in fact, enforce the act in any particular and as to any vessel where there is not an act of Congress which specifically cov-

ers every requirement of the act of the state as to every class, type, length or tonnage of a vessel.

(Chapter 200 of the Laws of Washington for 1907, the act which is involved here, is hereinafter referred to as "the act" or "the law").

Petitioners' argument, although not presented in in the same relationship, proceeds upon the following theory:

1. That there is a field of local matters incidentally affecting vessels navigating federal waters on which the state may legislate until Congress occupies the field;

2. That (a) inspection to determine seaworthiness, fitness of physical structure, condition of machinery, and related subjects, (b) licensing of the operating personnel, (c) control over the number of the crew and passengers to be carried, and (d) regulation of safety equipment are matters of local concern;

3. That as Congress has not made any specific regulations on these matters for all types and sizes of vessels, the state may make regulations therefor applicable to vessels of all types and sizes for which Congress has not made specific provision.

The correctness of the first premise does not seem to be arguable. The second and third premises are fundamentally unsound. It was so determined by the state court. Petitioners' argument on the false contentions is, however, so interwoven with an erroneous application of the true premise that the state may legislate on purely local matters that we feel we can best aid the court by approaching the questions in our own way rather than by following the argument of

petitioners in the order in which it is set forth in their brief and their specification of errors.

Our position is, therefore:

SUMMARY OF RESPONDENTS' ARGUMENT

I. The federal government has the exclusive right to regulate vessels navigating waters over which the United States has jurisdiction except as to matters purely local.

II. The regulations sought to be imposed by petitioners are not within the class of local regulations on which the state may legislate until Congress acts.

III. Even were it permissible for the state, in the absence of congressional action, to impose the regulations sought to be imposed, Congress has occupied the field to the exclusion of state regulation.

IV. Regardless of this court's conclusion on the federal question, the judgment of the state court is right and should be affirmed.

A. Executive construction that the act applies only to waters having no navigable outlet to the sea should be followed.

B. The act was adopted from the New York Navigation Law, which applies only to such waters.

C. The provisions for examination and licensing of officers constitute an unconstitutional delegation of legislative power.

D. Unless the act be construed to apply only to waters having no navigable outlet to the sea, it contains so much that is unconstitutional that the entire act must fail.

ARGUMENT

I.

The Federal Government Has the Exclusive Right to Regulate Vessels Navigating Waters Over Which the United States Has Jurisdiction, Except As to Matters Purely Local.

The power to regulate interstate and foreign commerce includes the regulation of navigation and was one of the primary objects which led to the adoption of the Constitution. The starting point of any inquiry as to the powers of Congress or the states in the matter of regulation of navigation is, of course, the case of *Gibbons v. Ogden*, 9 Wheat. 1, in which this court made that pronouncement.

When the subjects

> "are national in their character and require uniformity of regulation affecting alike all the states, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise there would be no protection against conflicting regulations of different states, each legislating in

favor of its own citizens and products and against those of other states. It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the states was vested in Congress."

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

"Waters navigable in themselves in a state and connecting with other navigable waters so as to form a waterway to other states or foreign nations cannot be obstructed or impeded so as to impair, defeat or place any burden upon a right to their navigation granted by Congress."

Harman v. Chicago, 147 U. S. 396.

There is, however, a field of matters which affect vessels, and which incidentally affect commerce, in which the states have power to legislate until Congress has acted on the subject.

"The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent the power to regulate commerce may be exercised by the states.

"Whether the power in any given case is vested exclusively in the general government depends upon the nature of the subject to be regulated."

* * * * * * *

"The states may exercise concurrent or independent power in all cases but three:

"1. Where the power is lodged exclusively in the Federal Constitution.

"2. Where it is given to the United States and prohibited to the states.

"3. Where, from the nature and subjects of the power, it must necessarily be exercised by the National Government exclusively."

Gilman v. Philadelphia, 3 Wall. 713.

The commerce clause of the Constitution as repeatedly stated,

"denies authority to the state in all cases where the subject is of such a nature as to demand that, if regulated all, its regulations should be through a general or national system, and that it should be free from restraint or direct burdens save as it is constitutionally governed by Congress; and on the other hand, as to those matters which are distinctive local in character, although embraced within the federal authority, the rule recognizes the propriety of the reasonable exercise of the power of the states, in order to meet the needs of suitable local protection, until Congress intervenes."

Wilmington Transportation Co. v. R. R. Comm. of Cal., 236 U. S. 151.

The subjects on which the state may so legislate are those matters which are of purely local concern.

"Regulations of this kind are necessary and indispensable in every commercial port, for the convenience and safety of commerce, and the

local authorities have a right to prescribe at what wharf a vessel may lie and how long she may remain there, where she may unload or take on board particular cargoes, where she may anchor in the harbor, and for what time, and what description of light she shall display at night to warn the passing vessels that she is at anchor and not under sail. They are like to the local usages of navigation in different port, and every vessel, from whatever port of the world she may come, is bound to take notice of them and conform to them."

Wm. Cushing v. Owners of Ship "John Frazier", 21 How. 184.

An exception to the general principle that the federal government has the exclusive power to regulate transportation,

"is the regulation of steamboats and other water craft in the ports and harbors of the states, which is required for the accommodation and safety of vessels resorting thither in the pursuits of business and commerce. These are police regulations in aid and furtherance of commerce, enacted by local authorities, who have a knowledge of the wants of the locality, and a deep interest in properly providing for them."

Steamboat "New York" v. Rae, 18 How. 223.

The states may also levy fees to defray the costs of a purely local regulation of harbor traffic. Those fees are not an objectionable burden on commerce.

"State regulations of harbor traffic, although

they incidentally affect commerce, interstate or foreign, are of local concern. So long as they do not impede the free flow of commerce and are not the subject of regulation by Congress, they are not forbidden."

Clyde Mallory Lines v. Alabama, 296 U. S. 261.

It has long been settled that the states may regulate pilotage as this "does not interfere with any system which Congress has established by making regulations, or intentionally leaving individuals to their own unrestricted action."

Cooley v. Board of Port Wardens of Philadelphia, 12 How. 299.

All such laws

"form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike—roads, ferries, etc., are component parts of this mass."

Gibbons v. Ogden, 9 Wheat. 1.

Quarantine laws are of this class.

"Quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until dis-

placed or contravened by some legislation by Congress.

"The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities."

* * * * * * *

"Quarantine laws are so analogous in most of their features to pilotage laws, in their relation to commerce, that no reason can be seen why the same principle should not apply."

Morgan v. Louisiana, 118 U. S. 455.

The state may also make laws and enforce liens concerning contracts not maritime in their nature "and it is no valid objection that the enforcement of such laws may prevent or obstruct the prosecution of a voyage of an interstate character."

The *Winnebago*,, 205 U. S. 354.

These laws, as this court said in *Cincinnati etc. Packet Co. v. Board of Trustees of Catlettsburg*, 105 U. S. 559, fall within that class of rules

"which, like pilotage and some others, can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing places can be properly made. If a regulation of commerce at all, it comes within that class in which the states may prescribe rules until Congress assumes to do so."

II.

The Regulations Sought to Be Imposed by Petitioners Are Not Within the Class of Local Regulations on Which the State May Legislate Until Congress Acts.

From the foregoing decisions of this court, the following seem to be the deductible rules for determining whether state laws affecting vessels and navigation are within the power of the state and not an infringement on the power of the National Government:

Are the laws distinctively local in their operation?

Gilman v. Philadelphia;

Wilmington Transp. Co. v. Cal. R. R. Com.

Do they affect only local usages of navigation?

Wm. Cushing v. Owners of Ship John Frasier.

Are they regulations of solely the ports of the state?

Steamboat New York v. Rea;

Clyde Mallory Lines v. State.

Can the regulations be most wisely exercised by the local authorities?

Cincinnati, Etc., Co. v. Board.

Are they best suggested by varying circumstances of different localities?

Gilman v. Philadelphia.

If the state law can meet all these tests then it may stand, but if, on the contrary, the subjects and the nature of the regulations which the state seeks to impose, are national in their character and require uniformity of regulation affecting alike all the states so that they must necessarily be exercised only by the National Government, then the state law must fail.

The regulations which petitioners claim the right to enforce under the authority of chapter 200 of the Laws of Washington for 1907 do not meet these tests. They are not purely local in their character. They are not regulations of local harbor traffic. They are not regulations of matters necessary because of any circumstances peculiar to the harbors or waters within the territorial limits of the state. They are not such that they are most capable of exercise by local authorities. They affect the very existence of the vessel herself and her right to navigate at all. If Washington may require changes in the hull and machinery of a motor tug so may Oregon. The changes ordered by Washington may differ from those required by Oregon to the extent that the owners of the vessel could not possibly comply with the orders of both states. If Delaware may regulate the machinery and hulls of vessels on the Delaware River and the Bay, so may Pennsylvania and New Jersey; if New York may do so on the Hudson and Long Island Sound, Connecticut, Rhode Island, and Massachusetts may prescribe what is necessary to be changed on the hull of a New York motor tug plying between the Hudson and the ports of those states. Each state may make its own regulations, the regulations may all conflict and compliance be impossible. The situation extends likewise to the Great Lakes. It is vital in this case.

One of the respondents in this case, Shaver Transport Co., is an Oregon corporation whose vessels are largely used in towing across the Columbia between Oregon and Washington. One is a Washington com-

pany, Knappton Towboat Co. (R. 14), whose vessels are largely used in towing on that river between Washington and Oregon. The record does not disclose—as indeed it could not—that a vessel whose hull and machinery are safe for operation and whose crew is ample and capable for navigation on the Oregon side of the river can not as safely ply the waters on the Washington side of the river. Vancouver authorities, under appropriate law for that purpose, may prescribe where the boats of the Shaver Transport Company may lie at anchor in that port, but to permit the state of Washington to say that a hull deemed sufficient in Oregon may not put in at Vancouver because Washington deems changes in the hull necessary, is to deny that vessel the right to engage in commerce between the two states.

The situation here is the same as was before this court in *Hall v. DeCuir*, 95 U. S. 485, in which this court held in violation of the Commerce clause a Louisiana law which provided that carriers should not discriminate in accommodations between persons on account of race or color. The reasoning of the court in that case so clearly fits the case here that we quote from the opinion:

> "It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each was at liberty to regulate the conduct of carriers while

within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabins during his passage down the river, or be subject to any ac-

tion for damages, 'exemplary as well as actual' by any one who felt hisself aggrieved because he had been excluded on account of his color.

"This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress in effect adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the states, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade."

In this case the regulations sought to be imposed by the state would not destroy uniformity on the Columbia River alone. Many vessels of respondents ply between ports on Puget Sound and British Columbia, occasionally some put in at California ports. A large portion of their navigation is in interstate and foreign commerce. They are engaging in interstate commerce when towing an intercoastal vessel or shifting her from pier to pier in the harbors of Puget Sound. Petitioners attempt to draw a distinction between the regulation of respondents' boats as such and what they contend the act does, *i. e.*, regulate them as engaging in the business of towing for hire. There can be no such distinction drawn. Manifestly the only business in which a tug engages is towing for hire. If a tug is inspected as to her hull and machinery,

her personnel licensed, her equipment regulated, and changes ordered in her hull and machinery, her freedom to navigate is regulated and burdened. When that navigation is on federal waters and in interstate commerce, the power to make such regulations rests exclusively in Congress.

The regulations which petitioners here sought to impose on respondents affect the very right of vessels to navigate the federal waters of Puget Sound, Willapa Harbor, Grays Harbor, the Columbia River, and other waters of the state of Washington which are under federal jurisdiction.

Petitioners claim authority under the act to compel respondents to

(a) Submit their vessels to inspection annually or oftener at his discretion at a cost to said owners of not less than five nor more than twenty dollars for each inspection.

(b) Make such changes, repairs and improvements as said Director may require.

(c) Carry such officers as he shall license as masters, pilots and engineers.

(d) Carry such crews as he shall deem necessary to manage such vessels with safety.

(e) Carry such life saving equipment as he shall require and approve.

(f) Carry such fire prevention apparatus as he shall require and approve.

(g) Keep on board at all times a copy of a license authorizing the vessel to navigate in and upon the waters of the state.

(h) Keep a copy of the first twenty-two sections of

the act (twelve pages) posted in a conspicuous place.

(i) Keep the vessel's name painted on her stern in the character and colors prescribed by section 16 of the act.

(j) Comply with all orders, regulations and requirements of the Commissioner.

Do petitioners seriously contend that they can lawfully make those requirements of a Canadian tug which tows a raft of logs from Vancouver, B. C., to Seattle, or a barge from Seattle to Vancouver, B. C.? Do they seriously contend that the respondents, Shaver Transport Co. and Knappton Towboat Co., over fifty per cent of whose business is towing across the Columbia River between points in Oregon and points in Washington (R. 57, 60) must stop that operation unless they submit to these requirements, or do they admit that these foreign tugs have the right to use the navigable waters of the United States without state interference, and seek only to make it impossible for our own tugs to compete with them in our own waters by loading upon them this mass of onerous requirements and regulations? Respondents claim the right to navigate the public waters of the United States lying within the territorial limits of the state on equal terms with the tug boat operators of British Columbia and Oregon. This is a right guaranteed by the Constitution because every citizen of the United States has the right to navigate its public waters on equal terms. To secure such equal terms to all was the purpose of conferring the exclusive power of regulation upon the federal government.

It is the same right to navigate federal waters

which this court recognized in *Harman v. Chicago*, 147 U. S. 396, where this court said:

> "The requirement that every steam tug, barge or towboat towing vessels for hire on the Chicago River or its branches shall have a license from the city of Chicago is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States except upon conditions imposed by the city. This ordinance is therefore plainly and palpably in conflict with the power of Congress to regulate commerce interstate and foreign. The steam tugs are not confined to any one particular locality but may carry on the trade for which they are licensed in any of the ports and navigable rivers of the United States. They may pass from the river and harbor of Chicago to any point on Lake Michigan or other lakes and rivers connected therewith. As justly observed by counsel: The citizen of any of the states bordering on the lakes who with his tug boat also enrolled and licensed for the coasting trade may wish to tow his or his neighbor's vessel must, according to the ordinance, before he can tow it into the Chicago River or any of its branches, obtain a license from the city of Chicago to do so. The license of the United States would be insufficient to give him access to these waters * * *."

The state court therefore correctly decided that the regulations which petitioners sought to impose encumbered the right of vessels to navigate freely on

Federal waters and therefore burdened interstate commerce.

III.

Even Were It Permissible for the State, in the Absence of Congressional Action, to Impose the Regulations Sought to Be Imposed, Congress Has Occupied the Field to the Exclusion of State Regulation.

But even should it be conceded that the inspection of hulls, the licensing of operating personnel, and other regulations which petitioners seek to impose upon respondents' vessels, were matters of purely local concern upon which the state might legislate until Congress had occupied the field, that field has been so occupied by Congress as to exclude any state regulation. Apparently petitioners' only contention at the present time is that chapter 200 of the Laws of 1907 may be enforced against such of respondents' vessels in such particulars as are not specifically provided for by federal legislation. Congress has, however, completely occupied the field in such a manner as to indicate that the laws which it has passed and the regulations made thereunder are sufficient regulations, and all the regulations, which it deems necessary.

The volume of legislation concerning vessels and navigation is literally tremendous. Title 46, Shipping, U. S. C., has 1315 sections. Title 33, Navigation and Navigable Waters, now has 950 sections. A great part of the Internal Revenue Laws consists of measures affecting navigation and shipping. Then there are volumes of regulations having the force of

law; as for example, respondents' exhibit 4. These laws and regulations are indeed comprehensive, covering the building, ownership, manning and operation of vessels in the most minute manner. All vessels are required to be registered or enrolled or, if very small, numbered. Even row boats are regulated.

> "Rowing boats, whether under oars or sail, shall have ready a lantern showing a white light which shall be temporarily exhibited in sufficient time to prevent collision."
>
> U. S. C., Title 33, sec. 76, Act of Cong. Aug. 19, 1890 c. 802 §1, 26 Stat. 322.

The federal laws are not restricted to the mere construction, operation and maintenance of the vessels. Congress has jurisdiction to regulate the rights of seamen. The word "vessel" includes every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water (U. S. C., Title 1, sec. 3, R. S. sec. 3) and every person who serves in any capacity on board a vessel is a seaman (U. S. C., Title 46, sec. 713, Act of Cong. Mar. 4, 1915, c. 153 §10; 38 Stat. 1168). There is an enormous body of legislation designed to provide for their protection, their safety and their comfort. The word "seamen" consumes five pages of the U. S. C. A. index.

All of the vessels involved in this case and the men who work upon them are subject to these laws. All are registered or enrolled and licensed to engage in the coasting trade under these laws. Some of them are engaged in interstate commerce and some of them in foreign; all are afloat on an international natural

highway which leads to and from every seaport in the world.

Petitioners say that there is no federal enactment providing for the inspection of the hulls of motor boats or their machinery, the licensing of their officers, the number of the crew or passengers. That is true, but the inference is that Congress has not thought such laws necessary. A bill for that purpose has been before Congress. A copy was read into the record (R. 53). There is nothing to indicate, that we know of, that in failing to pass it Congress desired to leave the subject to the individual states. There is much to indicate that it probably did not regard such legislation as necessary.

It is the statutory duty of the Commissioner of Navigation to recommend changes in the navigation law, U. S. C. Title 46, section 4, Act of Cong. Mar. 4, 1913, c. 141, sec. 1; 37 Stat. 736. In 1932 he did suggest that the larger class of motor driven vessels should be made subject to the same inspection laws as steamboats, but speaking of the smaller vessels he said:

> "Congress has paid special attention to their life saving equipment, navigation and supervision under existing laws, however, every provision seems to have been made which is reasonably necessary to the protection of those on board and if these small motor boats are operated in compliance with the laws now in force a reasonable degree of safety will be attained." (St. 139)

Such a law was subsequently enacted, Act. of Cong. June 20, 1936, 49 Stat. 1544.

Similar passages will be found in respondents' exhibits 6 to 11, inclusive.

The regulation and inspection of vessels by the Federal government extends in some particular to every type of vessel, and, as to some vessels, to every type of regulation.

The matter of lights is governed by Federal law as to all vessels—even row boats. The Coast Guard inspects all vessels as to life preservers, fog horns, and fire prevention equipment, whether the rules of the road are posted, whether numbers are properly cut on the main beam (R. 43, 55, 61).

The customs service of the Treasury Department measures all hulls (R. 43) and inspects hulls when the names of vessels are changed.

The Bureau of Marine Inspection and Navigation of the Department of Commerce inspects the hulls and boilers of all steam vessels.

By the Act of Congress, June 20, 1936, 49 Stat. 1544 all existing laws covering the inspections of steam vessels were made applicable to seagoing vessels of three hundred gross tons and over propelled in whole or in part by internal combustion engines.

In 1907, when the law here in question was enacted, Congress had not as yet legislated extensively with respect to motor boats, thus indicating that it felt that no regulation of motor boats was necessary, but in 1910 Congress passed chapter 16 of Title 46 U. S. C., known as the Motor Boat Code (Act of Cong. June 9, 1910 C. 268; 36 Stat. 462). That act governs all motor propelled vessels under 65 feet in length and therefore 111 of the 139 involved in this suit. Sec-

Insert as page 22½ of respondents' brief—to be read following paragraph six on page 22

When the act of June 20, 1936 (49 Stat. 1544; Public No. 722; H. R. 12419, 74th Cong. 2d Sess.) was under consideration by Congress, both the House and the Senate in reporting the bill favorably called attention to the fact that the Bureau of Navigation and Steamboat Inspection (now Bureau of Marine Inspection and Navigation) was working on plans for conferences at which would be considered a thorough revision of all laws pertaining to motor boats, vessels under three hundred tons propelled by internal combustion engines, and the smaller steam vessels. 74th Cong. 2d Sess. House Report No. 2505, Senate Report No. 2212.

On June 22, 1936, the Bureau sent to the motorboating industry, yacht clubs and others concerned, its Circular Letter No. 11 giving the Bureau's suggestions for revision of the laws pertaining to such vessels. The Bureau advises that a series of conferences were held with those interested and that as a result a proposed bill is being drafted. Circular Letter No. 11 is a printed document. Neither the proceedings of the conferences nor the draft of the proposed bill are available.

tion 511, Title 46 U. S. C. (Section 1) defines motor boats. Section 512 (2), divides them into classes. Section 513 (3), describes minutely the lights each class shall carry. Section 514 (4), prescribes minutely their signaling equipment and how it shall be used. Section 515 (5), provides the number and kind of life preservers they shall carry. Section 515 (5), further provides that motor boats carrying passengers shall be navigated in charge of a man licensed by the local board of steamboat inspectors and then closes with this proviso:

> "*Provided*, That motor boats shall not be required to carry licensed officers except as requir- by this chapter."

Section 516 (6), provides for fire fighting apparatus. Section 517 (7), provides penalties, and section 518 (8), provides:

> "The Secretary of Commerce shall make such regulations as may be necessary to secure the proper execution of this chapter by collectors of customs and other officers of the government."

If petitioners ever had any rightful power by virtue of chapter 200 to regulate any vessel navigating the public navigable waters of the United States by way of prescribing life saving equipment, fire equipment, lights, licensed officers, and all the other things which they claim the right to do, it is certain that as to 111 of the vessels involved in this suit such powers were abrogated by the Federal Motor Boat Law of 1910. But petitioners never had any such powers. There is not a single subject dealt with in chapter

200, not a field entered, that was not already occupied by congressional enactments.

Since this case was tried in the state court, Congress has further extended regulation of vessels by the federal government. By the Act of Congress of August 26, 1935, 49 Stat. 868, no vessel regardless of size or rig, except certain government vessels, is permitted to transport any inflammable explosive or like dangerous cargo until inspected by Federal inspectors.

By the Act of June 23, 1936, 49 Stat. 1889, all vessels, regardless of tonnage, size, or manner of propulsion having on board inflammable or combustible liquid cargo in bulk, except certain government vessels, are to be considered as steam vessels subject to inspection under those laws.

By the Act of May 20, 1936, 49 Stat. 1542, provision is made for the licensing of coasting and fishing vessels.

By the Act of June 20, 1936, 49 Stat. 1593, the provisions of the Coastwise Load Line Act of August 27, 1935, are extended.

Congress has constitutional power to regulate navigation. It has regulated it. It can not be, therefore, as this court said in *Prigg v. Pennsylvania*, 16 Pet. 539:

> "* * * that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of congress, in what it does prescribe, manifestly indicates that it does

not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it. This doctrine was fully recognized by this court, in the case of *Houston v. Moore*, 5 Wheat. Rep. 1, 21, 22; where it was expressly held, that where congress have exercised a power over a particular subject given them by the constitution, it is not competent for state legislation to add to the provisions of congress upon that subject; for the will on congress upon the whole subject is as clearly established by what it has not declared, as by what it has expressed."

The power of Congress has been exercised and the regulations which Congress deemed it proper to make are now in full operation.

The principle enunciated in *Prigg v. Pennsylvania* has been time and time again adhered to by this court.

In *Missouri Pac. Ry. Co. v. Porter*, 273 U. S. 341, decided in 1927, this court said:

"Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary. Its powers to regulate such commerce and all its instrumentalities are supreme and as that power has been exerted state laws have no application. They cannot be applied in coincidence with, as complementary to, or in opposition to Federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

In upholding the exclusive operation of the Federal Employers Liability Act in an opinion rendered in 1929 in *Chesapeake & Ohio R. R. Co. v. Stapleton*, 279 U. S. 587, this court quoted from *Prigg v. Penn.* the same passage quoted in the opinion in *Southern R. Co. v. Railroad Commission*, 236 U. S. 439. In the same year *Prigg v. Penn.* was cited in the opinion in *International Shoe Co. v. Pinkus*, 278 U. S. 261, and in an opinion handed down April 2, 1934, in *Gilvary v. Cuyhoga Valley R. Co.*, 292 U. S. 57, this court cited *Prigg v. Penn*, as its first case in support of the following pronouncement concerning the act governing railroad equipment:

> "So far as the safety of such vehicles is concerned these acts operate to exclude state regulation whether consistent, complementary, additional or otherwise."

The fact that the state law is passed in exercise of the police power in no manner affects the rule we are discussing. See the opinion in *Napier v. Atlantic Coast Line*, 272 U. S. 605, and that portion of the opinion in *Kansas City S. R. Co. v. Kan. Valley Drainage District*, 223 U. S. 573, where this court says that the operation of the rule cannot be avoided "by simply invoking the convenient apologetics of the police power."

Petitioners' argument that the regulations they seek to impose are regulations of local matters which are valid because Congress has not acted with respect to certain specific vessels in certain particulars, is based largely upon the railroad cases. The argument is largely disposed of by the distinction noted by this

court in one of the cases relied upon by petitioners, *Smith v. Alabama*, 124 U. S. 465, in which this court said:

> "It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a state and by the authority of its laws * * *. The places where they may be located, and the plans according to which they may be constructed are prescribed by the legislature of a state * * *. The safety of the public in person and property demands the use of specific precautions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and hedges, the kinds of cuts and tunnels, the mode of crossing highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation designed to protect persons and property otherwise endangered by their use are strictly within the limits of the local law."

But even in the case of railroads, which are not natural highways of commerce, the state may not enact even supplemental legislation where Congress has occupied the field.

This principle is well illustrated by the opinion in

Southern R. Co. v. Railroad Commission, 236 U. S. 439, where this court said:

> "In *Erie R. Co. v. New York*, 233 U. S. 671, a like ruling was made in a case where the New York law punished a railroad company for allowing an employee to work more than eight hours when the Federal statute punished the company for employing him for more than nine hours—even though it was argued that the state legislation was not in conflict with the Federal act, but rather in aid of it. The same contention is made here, inasmuch as the Indiana law requires hand holds on sides *or* ends of cars, while the Federal statute requires hand holds to be placed both on the sides and ends of cars.
>
> "The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control. The safety appliance act having superseded the Indiana statute, the judgment imposing the penalty must be reversed, and the case remanded for further proceedings not inconsistent with this opinion."

The court also said:

> "But so far as it did legislate, the exclusive effect of the safety appliance act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. The states thereafter could not legislate so as to require greater or less

or different equipment; nor could they punish by imposing greater or less or different penalties. For, as said in *Prigg v. Com.*, 16 Pet. 618, 10 L. Ed. 1090: 'If Congress have a constitutional power to regulate a particular subject and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislations to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it * * * the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed.'"

Congress has occupied the field of regulation of vessels and their navigation of federal waters. Its failure, and, in some instances declination, to make further regulations indicates its decision that there should be no further regulation.

IV.

Regardless of This Court's Conclusion on the Federal Question, the Judgment of the State Court Is Right and Should Be Affirmed.

A.

Executive construction that the act applies only to waters having no navigable outlet to the sea should be followed.

But even had the state court been wrong on the federal question, there are other reasons why the writ of prohibition granted by that court must remain in effect.

The state court based its opinion (R. 140) on the ground that the federal constitution forbade the petitioners from enforcing chapter 200 as to respondents' vessels. In the course of its opinion, however, the court did note one of the reasons why petitioners must fail, regardless of the federal question, by saying:

> "We are satisfied that the act is invalid if applied to the navigable waters over which the Federal Government has control. We are confirmed in this view by the fact that in the twenty-nine years since its enactment no real attempt has been made to enforce it against those operating vessels of any kind upon the the navigable waters of the United States until the present controversy arose." (R. 146)

The state court did not note why no real attempt had been made to enforce the act. The records of the state do, however, disclose the reason. That reason was because the attorney general of the state, recognizing the exclusive right of Congress to the legislature. No test was ever made of the act to

regulate the navigation of federal waters, advised the commissioner of labor (the state official charged with the enforcement of the act), even before the act would go into effect, that it should be construed to apply only to the waters of the state having no navigable outlet to the sea. Report of the Attorney General of Washington 1907-'08, page 136. Attorney General, Opinions 1907-'08, page 136.

Chapter 200 of the Laws of 1907 became effective ninety days after the adjournment of the session at which it was enacted; that is to say, on June 11, 1907. (See statement of Secretary of State on unnumbered page XIV of the Session Laws for that year.) The attorney general's opinion to the commissioner of labor was given on June 1, 1907.

Unless the act be given a construction that it applied only to the waters within the state having no navigable outlet to the sea, reasoned the attorney general, it would be in conflict with the commerce clause of the federal constitution, and the act should therefore be so construed as to avoid that conflict.

It is apparent from the facts stated by the attorney general, and which were evidently submitted to him by the commissioner of labor, that the attorney general was considering situations just such as those which have arisen in this case. His opinion is such a succinct analysis of the bases of the federal government's exclusive jurisdiction that we set the opinion out in full in an appendix hereto (Appendix A, post following page 43).

This report of the attorney general was made to the legislature. No test was ever made of the act to

determine whether his construction was correct. The legislature has since met in thirteen regular sessions and several special sessions and no amendment has ever been made to the act to express any intent on the part of the legislature that it wanted the labor commissioner to exercise the duties imposed upon him by the act with respect to vessels navigating federal waters. Twenty-nine years elapsed after the passage of chapter 200 and this interpretation without any attempt to apply it to vessels on federal waters. Respondents have acquired property interests relying on that interpretation and the acquiescence therein by the legislature. Under these circumstances the act should now be construed as though it specifically exempted from all its provisions vessels navigating federal waters.

It has been held repeatedly by the Supreme Court of the State of Washington that the opinions of the attorney general of the state are always valuable in the interpretation of questioned statutes and, although not binding, are always considered and frequently resorted to, *Huntworth v. Tanner*, 87 Wash. 670 at page 671; and that constructions of an act of the legislature by the legal or executive department of the state, silently acquiesced in by the failure of the legislature to amend the particular act, particularly where property interests have been acquired in reliance upon the departmental construction, are entitled to weight in the construction of the statute.

Spokane & Eastern Trust Co. v. Young, 19 Wash. 122;

State ex rel. Cowles v. Shively, 63 Wash. 103;

State ex rel. Leach v. Fishback, 79 Wash. 290;

State ex rel. Ball v. Rathbun, 144 Wash. 56.

In the *Spokane & Eastern Trust Co.* case the Supreme Court of the state said:

> "It is further shown, however, that soon after the act was passed, the attorney general was called upon by the state treasurer to construe it in this particular, and he rendered an opinion holding that the rate as to state warrants was fixed by the act at eight per cent. While, of course, this construction by the executive branch of the government is not controlling, it is entitled to considerable weight in determining the intention of the legislature in the premises, in view of the fact that it was generally understood thereafter that such warrants bore eight per cent., the same as formerly, and there has been a session of the legislature since then and no change made."

In the *Cowles* case (1911) the court, referring to an opinion of the attorney general said:

> "This opinion, with others of the attorney general, was published in the usual manner, in his report to the governor and the legislature for the year 1905 at page 50. Three legislative sessions have been held since then and no change made in this law. This court has recognized the rule that the construction of a law of

> doubtful meaning by the department of a state or government charged with its administration, and by its highest law officer, when such law has to do with a matter of public concern, is entitled to considerable weight in determining the intention of the legislature, though, of course, such construction is not binding upon the courts."

The attorney general's opinion on chapter 200 of the laws of 1907 was likewise published in his report to the legislature. Thirteen regular sessions of the legislature and several special sessions have been held since.

In the *Leach* case, while the court did not rely upon the interpretation of the statute by the insurance commissioner because the court found that that interpretation was incorrect, the court answered the contention of counsel that the executive construction should be followed by saying:

> "This is no doubt true where a departmental construction has been placed upon an act and property interests have been acquired by long usage."

In the *Ball* case, the court, speaking of executive construction of an act, said:

> "This has been the uniform executive construction since the act of 1913, covering a period of some fourteen years. An executive construction is accepted generally by the courts as persuasive where the legislature has silently acquiesced in such construction by failing to amend the particular act."

The value and force of executive construction has been recognized by this court.

Boyd v. U. S., 116 U. S. 616;
Union Insurance Co. v. Hoge, 21 How. 35;
Citizens Bank v. Parker, 192 U. S. 73.

Here the legal advisor to the executive officer charged with the enforcement of the act advised him that the act did not apply to vessels navigating federal waters. The opinion was rendered before the act became effective. Since that time the legislature of the state of Washington has met not less than biennially. At none of these sessions has the law been amended nor, so far as we can ascertain, has any bill to amend it ever been presented to the legislature.

Respondents in this case have, during this period of twenty-nine years, acquired large property interests in their vessels relying upon this interpretation by the attorney general and the acquiescence of the legislature therein.

Not only has the attorney general's interpretation of the act been acquiesced in by the legislature, but there has been no attempt to enforce it as to vessels navigating federal waters.

The witness Durham did testify that for a short time a number of tug boats on Puget Sound were inspected (R. 128) but this was disproved by the testimony of witness Davis (R. 63) and witness Sutter, the state inspector during the same period covered by Durham's testimony (R. 131).

After this long period of recognition by the legislature and the executive department that the act did

not apply to federal waters, the act should now be construed as if it clearly so provided.

B.

The act was adopted from the New York Navigation Law, which applies only to such waters.

It must be confessed that it is difficult to determine whether the legislature intended that the act should apply to federal waters. It must be presumed that the legislature of the State of Washington was cognizant of such a fundamental principle as that the state was without power to regulate the lights which vessels should display on federal waters, as the matter of lights was at that time fully regulated pursuant to act of Congress. Section 9 of chapter 200 providing what lights shall be displayed makes no exceptions. That section, if applied to federal waters, is so clearly in conflict with the commerce clause that even petitioners do not contend that it may be enforced on federal waters. The same is true as to section 16—Name and Home Port of Vessel—on the stern of the vessel, and is likewise true of other provisions of the act. Section 8 provides rules for navigation "on the waters within the jurisdiction of the state, excepting the waters which are under the jurisdiction of the United States." Section 25 contains a provision applying only to the Straits of Juan de Fuca, which are federal waters.

The act is, as stated by the attorney general of the state, taken substantially from the New York Navigation Law, Laws of 1897, chapter 592; Amended

Laws 1903, chapter 420; chapter 36 New York Consolidated Laws 1916; chapter 37 New York Consolidated Laws 1909.

The Washington attorney general apparently was considering chapter 592 of the Laws of 1897, as he referred to the fact that the New York law applied only to steam vessels, whereas, by the amendment of section 1 in 1903, Laws of 1903, chapter 420, the New York law applied to all vessels. The title of the Washington act regulates vessels "navigating the waters within the jurisdiction of this state, excepting vessels which are subject to inspection under the laws of the United States." Section 1 of the New York act applied to all steam vessels "navigating the waters within the jurisdiction of this state, excepting vessels which are subject to inspection under the laws of the United States." Whether the legislature of Washington referred to territorial boundaries when it referred to vessels "navigating the waters within the jurisdiction of this state" or whether it referred to all waters over which the state had control with respect to navigation is hard to say. The fact that section 8 referred to "the waters within the jurisdiction of the state, excepting the waters which are under the jurisdiction of the United States," might be construed to indicate that it meant all waters within the territorial boundaries, but as the legislature made no exception with respect to lights (section 9), life preservers (section 12), placing of name of the boat on her stern (section 16), and others, it may be that the legislature intended by the use of the term "within

the jurisdiction of this state" to refer only to waters in which the state had jurisdiction to inspect and regulate. The provision in section 25 referring to the Straits of Juan de Fuca was not in the bill as originally introduced, but was added by House amendment (Washington Senate Journal 1907, page 812), so that the legislature may have, in the closing days of the session, when the bill was passed, determined to leave the amendment in even though it might go beyond the scope of the title rather than delay passage of the bill by disagreement between the two branches of the legislature. In any event, the attorney general, who must have been familiar with the situation, his opinion being almost contemporaneous with the passage of the act, determined that it applied only to purely state waters. New York has apparently always considered that its law should be so applied, for it will be noted that the consolidators in the Consolidated Laws of 1909, preceding chapter 37, said with respect to the New York law:

> "The navigation law brought together the general statutory provisions relating to the navigation of the waters under state control, except the canals."

This note is also found in the Consolidated Laws of 1916, chapter 36. The Consolidator in Consolidated Laws of 1909 noted the increase in the use of motor boats, saying:

> "Within the last few years the use of the waters of the state has been much increased by the use of motor boats which, bearing the same relation to waterways that the automobile

does to highways, require clear and uniform regulations. A competent and complete revision of the Navigation Law appears advisable."

This regulation was to a large extent accomplished by the enactment by that state of chapter 765 of the Laws of 1913 relating to motor boats.

C.

The provisions for examination and licensing of officers constitute an unconstitutional delegation of legislative power.

Regardless of this conclusion on that matter, however, there are other reasons why the writ of prohibition granted by the state court must stand. Section 2 of chapter 200 exempts from inspection all vessels subject to inspection under the laws of the United States. The legislature does not refer to any particular laws or to any particular character of inspection.

As we have shown above, all respondents' vessels are subject to some inspection under some federal law, and petitioners therefore clearly have no power to inspect the hulls and machinery of those vessels, and the prohibition must stand as to such inspection.

As the attempt of petitioners to enforce inspection of respondents' vessels must fail, regardless of the federal question involved, because those vessels are inspected under laws of the United States, the attempt of the petitioners to require the licensing of officers on those vessels must likewise fail, regardless of the federal question, because the power attempted

to be conferred on the commissioner of labor constitutes an unlawful delegation of legislative power. Section 14 of the act provides in part:

> "Every person employed as master, pilot or engineer on board of a steam vessel or vessel propelled by machinery, carrying passengers for hire or towing for hire, shall be examined by the commissioner as to his qualifications, and if satisfied therewith he shall grant him a license for a term of one year for such boat, boats or class of boats as said commissioner may specify in such license."

The act sets no standards whatsoever by which the commissioner shall determine the qualifications of the person to be examined. It is well settled by the law of the state that power, such as attempted to be granted by this section, may not be so granted:

State ex rel. Makris v. Superior Court, 113 Wash. 296;

State v. Northwestern Electric Co., 183 Wash. 184;

and by this Court:

Panama Refining Co. v. Ryan, 293 U. S. 388;

Schechter v. United States, 295 U. S. 495.

D.

Unless the act be construed to apply only to waters having no navigable outlet to the sea, it contains so much that is unconstitutional that the entire act must fail.

Provisions in the act apparently intended to apply alike to state waters and federal waters, which clearly could not be applied to federal waters, are so intermingled with provisions specifically exempting federal waters that unless the entire act be interpreted to apply to state waters only, as the attorney general of the state interpreted it, and as the law from which it was copied has been construed in New York, the entire act must fail. There is no saving clause in the act. The legislature expressed no desire that the act should stand in part if part should be declared to be unconstitutional. The same legislature, however, did express such a desire in another act passed at the same session. We refer to chapter 142, Laws of 1907, which provides for the furnishing by carriers of cars to shippers and prescribing the time of loading, transporting and unloading the same. The legislature appended to that act a section (section 26) reading as follows:

> "If any section, subdivision, sentence, clause or purpose of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the act."

It is the settled law of the state that the entire act must fail where so much of an act must fail because unconstitutional that it will not be presumed the legislature intended only part to stand.

State v. Powles & Co., 90 Wash. 112;
Northern Cedar Co. v. French, 131 Wash. 394.
Corwin Investment Co. v. White, 166 Wash. 195.

By giving the act the interpretation which the attorney general gave it, that is, confining it to land-locked waters, there is no doubt as to the constitutionality of any of its provisions, no conflict with federal law, and it can operate in the field in which the legislature evidently intended it to operate.

We therefore submit that the state court correctly determined that the regulations which petitioners sought to impose are a burden on interstate commerce, that they are of a character which Congress alone has power to impose, but that such power as the state might have if Congress had never occupied the field has been superseded by the exercise of that power by Congress.

We further submit that in any event the judgment of the state court is right for the reasons given above, and that the judgment should be affirmed.

Respectfully submitted,

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APPENDIX A

REPORT OF THE ATTORNEY GENERAL OF WASHINGTON—1907-1908, p. 136

Opinion No. 131

Opinion rendered June 1, 1907, by A. J. Falknor, to Hon. C. F. Hubard, commissioner of labor, Olympia, Washington.

Your inquiries involve a determination of the extent and application of the Laws of 1907, chapter 200, providing for state inspection of vessels.

Section 2 of the act provides:

> "The commissioner of labor shall annually, or oftener if he has good cause to believe it reasonable, inspect, or cause to be inspected, every steam vessel or other vessel operated by machinery engaged in carrying passengers for hire or towing for hire excepting vessels which are subject to inspection under the laws of the United States."

By the terms of the act aforesaid, vessels which are subject to inspection by the United States are exempt. This necessitates an investigation into the jurisdiction of the United States to determine what boats are subject to federal inspection.

The jurisdiction of the United States extends, in the regulation of navigation, over all "navigable waters that flow from one state into another, and out of a state into the sea, coastwise, and upon the sea to and from foreign countries."

This right arises out of the power granted to congress in article I, section 8, of the federal con-

stitution authorizing the regulation by congress of commerce with foreign nations, and among the several states, and with the Indian tribes, together with the judicial power extending over admiralty and maritime jurisdiction granted by section 2, article II of such constitution. There are decisions, however, both state and federal, which, while granting that for the specific purposes therein mentioned, the power of congress is paramount and exclusive, deny the jurisdiction of congress over vessels operating entirely within the limits of a state that do not engage in interstate commerce, although navigating waters within the jurisdiction of the United States. Indeed it must be recognized that the absolute right of the federal government to regulate and control all vessels operating on navigable waters within its jurisdiction, regardless of their business, is yet an unsettled question.

7 Cyc. 459.

The present federal navigation laws, however, are drawn on the theory that they are applicable to all vessels operating on all the waters within the jurisdiction of the United States, regardless of the character of the business in which they are engaged.

Section 440, Revised Statutes:

> "The existing legislation of congress with regard to steam vessels proceeds upon the asumption that it possesses full power to regulate all vessels navigating public waters of the United States whether they are engaged in commerce or not. * * * And it also is apparent that congress proceeds upon the theory that proper reg-

ulation requires that all vessels in those waters shall be subject to one uniform system."

Oyster Police Steamers, 31 Fed. Rep. 763; *Sinnot v. Davenport*, 22 How. (U. S.) 227; *Harman v. Chicago*, 147 U. S. 396.

"The question is whether or not congress has, under the constitution, power to regulate by law the navigation of boats and vessels floating in the navigable waters of the United States, when engaged exclusively in the domestic commerce of the states. The respondent's counsel answer this question in the negative, on the ground that the power of congress is restricted to the regulation of commerce among the several states. If the power of congress is not full and plenary over navigation in all the waters of the United States and over all vessels carrying on commerce upon the same, whether foreign, coastwise, interstate, or strictly domestic to the states, a disastrous conflict must occur, both legislative and judicial. If the respondent's counsel be right in their position, congress has power to regulate one class of vessels and the states another class navigating the same waters side by side. In order to determine the law and the jurisdiction it would be necessary in every case to first ascertain in what kind of commerce the vessel is engaged. Congress would have the undoubted right to prescribe rules and regulations for the navigation of vessels carrying on commerce among the states and afloat upon the waters of the United States. The states, upon the re-

spondent's theory, would have power to regulate the navigation in the same waters of water-craft engaged in their strictly domestic commerce. The federal government might prescribe one set of rules and regulations; the state government, a different set of rules and regulations. By one authority certain signals for the safety of navigation might be prescribed; by the other, different signals for the same emergency. One legislative power might, in a given situation, give the ascending boat the channel; the other, the descending boat. One government might lay down a rule for steam and sail vessels passing each other, in conflict with the rule prescribed by the other. In short, the conflict of rules for the safe navigation of water-craft carrying passengers and property in the narrow water-ways of our numberless rivers and artificial channels of commerce would be infinite, unless the power of the states be excluded and that of the federal government be made full and plenary over the navigable waters of the United States. It is needless to dwell upon the mischiefs likely to result from a conflict of rules and regulations. They would be simply intolerable."

U. S. v. Burlington etc. Co., 21 Fed. 331;
City of Salem, 37 Federal Rep. 846.

However this is more theoretical than practical. Navigation, on practically all navigable waters within the jurisdiction of the United States, may be said to be under federal control as it would be hard to find a vessel which did not, at some time, take goods and

passengers which come within the definition of interstate commerce.

Steamer "Daniel Ball," 10 Wall. (U. S.) 557.

The custom officers, and other authorities required to enforce the federal navigation laws, proceed, also, upon the theory that such law applies to all vessels mentioned therein that operate on the navigable waters within the jurisdiction of the United States, regardless of their business.

A construction of the state law should be found, if possible, that would avoid a conflict of authority. There can not be concurrent inspection. It is therefore advised that the act of congress regulating navigation, is paramount and exclusive upon the navigable waters in this state within the jurisdiction of the United States.

Congress has no jurisdiction, however, over inland lakes.

> "A lake or river which is completely within the limits of a state, without any navigable outlet to any other state or country, is a navigable water of the state not within the jurisdiction of the federal government."
>
> *U. S. v. Burlington etc. Co.*, 21 Fed. Rep. 331.

In this state, therefore, congress has exclusive jurisdiction over Puget Sound and all its arms, and all other navigable waters flowing into the Pacific ocean, but does not have jurisdiction over any of the inland lakes or rivers of the state which have no navigable outlet to the sea.

Under the various acts of congress the following vessels are subject to inspection by the federal government (U. S. Revised Statutes, sections 4399-4462): All steam vessels (a vessel is deemed a steam vessel whether propelled in whole or in part by steam); vessels of other countries; boats for navigating canals; all coastwise-going vessels; sail vessels of over 700 tons carrying passengers for hire; all other vessels and barges of over 100 tons carrying passengers for hire; every ferry boat, yacht or other small craft of like character propelled by steam; all vessels of above 15 gross tons carrying freight or passengers for hire not engaging in fishing as a regular business, propelled by gas, fluid, naphtha, or electric motors; tug boats, towing boats, and freight boats; and all foreign, private steam vessels carrying passengers from any port in the United States to any other place or country.

All the above-named vessels, being subject to inspection under the federal statutes, are consequently, even by the terms of the state statute, exempt from inspection by the state, except upon inland rivers and lakes.

Section 4426, as amended by the act of May 16, 1906, contains the following provision:

> "All vessels of fifteen gross tons or less propelled in whole or in part by gas, gasoline, petroleum, naphtha, fluid or electricity, and carrying passengers for hire, *shall carry one life-preserver*, of the sort prescribed by the regulations of the board of supervising inspectors, *for every passenger carried and no such boat*

while so carrying passengers shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors. No examination shall be required as a condition of the obtaining of such license, and any such license shall be revoked or suspended by the local board of inspectors for misconduct, gross negligence, recklessness in navigation, intemperance, or violation of law on the part of the hodler, and if revoked, the person holding such license shall be incapable of obtaining another such license for one year from the date of revocation."

Such vessels being vessels propelled by machinery are likewise required to comply with the provisions of the act of congress of June 7, 1897, relating to regulations for preventing collisions upon certain harbors, rivers and inland waters of the United States. That act relates to lights, signals, steering, etc. Such vessels also, at all times when under way, are subject to examination and inspection by examining officers and others charged with the enforcement of the navigation laws, to see that the above requirements are observed. No certificate of inspection of such boats appears to be issued, and no other inspection except as heretofore set out, seems to be required. The only written license issued is to the person, authorizing him to operate and navigate vessels of fifteen gross tons or less, propelled in whole or in part by gas, gasoline, petroleum, naphtha, fluid, electricity, etc., and carrying passengers for hire. No examination as to fitness is required of an applicant for such

a license, but it may be revoked for the reasons copied in the above statute.

Are such boats, when carrying passengers for hire, subject to inspection by the state law when operating on waters within the jurisdiction of the United States?

> "With reference to purely local matters pertaining to shipping and navigation, a state may legislate *if congress has taken no action upon the subject.*"
>
> 25 A. & E. Encyc. of Law, 863.

(Here the attorney general quoted from *Prigg v. Pennsylvania* the same passage quoted in the foregoing brief. It is omitted to avoid repetition.)

> "In the present case a neglect or refusal of the owner of the tugs to pay the license required by the ordinance subjects him to the imposition of a fine. His only alternative is to pay the fine, or the use of his tugs in their regular business will be stopped. Of course, the ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States. It would be a burden and restraint upon that commerce, which is authorized by the United States, and over which congress has control. No state can interfere with it, or put obstructions upon it, without coming in conflict with the supreme authority of congress. The requirement that every steam tug, barge or tow-boat, towing vessels or craft for hire in the

Chicago river or its branches shall have a license from the city of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of congress to regulate commerce, interstate and foreign. The steamtugs are not confined to any one particular locality, but may carry on the trade for which they are licensed in any of the ports and navigable rivers of the United States. They may pass from the river and harbor of Chicago to any port on Lake Michigan, or other lakes and rivers connected therewith. As justly observed by counsel: The citizen of any of the states bordering on the lakes who with his tugboat, also enrolled and licensed for the coasting trade, may wish to tow his or his neighbor's vessels, must, according to the ordinance, before he can tow it into the Chicago river, or any of its branches, obtain a license from the city of Chicago to do so. The license of the United States would be insufficient to give him free access to those waters."

Harman v. Chicago, 147 U. S. 406-7.

"In discussing the question, whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to congress, or is retained until congress shall exercise the power. We may dismiss that

inquiry, because it has been exercised, and the regulations which congress deemed it proper to make, are now in full operation."

Gibbons v. Ogden, 9 Wheat. (U. S.) 200.

But here congress has acted upon a subject upon which it has plenary power. Such boats, though having no written license to operate, have implied license to navigate the waters within the jurisdiction of the United States, upon complying with the conditions set out. If such boats should fail to observe the law of June 7, 1897, relating to lights, signals, steering, etc., they are liable to fine and damages sustained. Should the licensed engineer in charge be guilty of misconduct, gross negligence, recklessness in navigation, intemperance, or violation of laws, his license shall be revoked and he be precluded from obtaining another within one year from the date of revocation. Indeed it must be observed that the inspectors may, under the above law, inspect the boat to determine whether there was misconduct, gross negligence, recklessness in navigation, intemperance, or violation of law, and in making such inspection an examination of the boat, its machinery and the condition of the same would have to be made.

The character of the inspection required by the federal government to relieve from state inspection is not stated and the requirements imposed upon such craft constitute, if properly enforced—and it will be presumed the federal officers will do their duty—a very substantial inspection.

The regulation of such boats upon the waters of the United States being within the exclusive jurisdic-

tion of congress, congress has acted upon the matter and has indicated such an inspection as it deemed adequate. Under the decisions quoted in the cases of *Briggs v. Pennsylvania, supra; Harman v. Chicago, supra, and Gibbon v. Ogden, supra,* when congress has acted upon a matter within its jurisdiction, its action must be taken as final and exclusive, and the state will not be permitted to add to, or supplement such legislation.

It may be conceded that a state, in the exercise of its police power, may pass and enforce laws for the protection of the health, lives, and property of its people, against the dangers arising under interstate transportation and commerce, and that such laws may be enforced so long as they do not conflict with the provisions of federal legislation.

Nashville R. v. Alabama, 128 U. S. 96.

But here congress has acted upon a subject upon which it has plenary power, even were this conceded to be a matter pertaining to the police power of the state.

> "The line which separates the powers of congress is not always distinctly marked and oftentimes it is not easy to determine on which side a particular case belongs. * * * State legislation which seeks to impose a direct burden upon interstate commerce or to interfere directly with its freedom does encroach upon the exclusive power of congress."

Hall v. DeCuir, 95 U. S. 488.

This applies to the transportation of passengers as well as freight.

"If as our whole course of legislation on this subject shows, the power of congress has been universally understood in America, to comprehend navigation, it is a very persuasive, if not a conclusive argument, to prove that the construction is correct; and, if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to congress, and no exception to the grant can be admitted, which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers, is as much a portion of the American marine, as one employed in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government, which has been thought best fitted for the purpose generally. * *

"The argument urged at the bar, rests on the foundation, that the power of congress does not extend to navigation, as a branch of commerce, and can only be applied to that subject incidentally and occasionaly. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the constitution, or by reason, for discriminating between the power of congress over vessels employed in navigating the same seas. We can perceive no such distinction."

Gibbons v. Ogden, 9 Wheat. (U. S.) 215-6.

An examination of the state law in question shows that it goes far beyond the police power that may, in

the absence of congressional legislation, be exercised by the state. Many of these crafts under fifteen gross tons, operated by gas, etc., navigate the Columbia river and waters contiguous to this state and British Columbia, and are engaged in the carrying of passengers and freight between this state and Oregon and British Columbia. Under the present federal navigation law such boats may operate, if in charge of one licensed engineer. By the state law more than one licensed officer may be required. By the federal law one life preserver of the sort prescribed by the regulations of the board of supervising inspectors for every passenger carried is required. By the state law not only may a greater number of life-preservers be required but one-half of those required are of a defined kind and the other half such as the state inspector may designate. By the state law the number of passengers in such boat may be limited. In addition, these boats now permitted to operate on federal waters will be required to pay an annual inspection fee of not less than five nor more than twenty dollars in addition to an annual license fee of five dollars.

"In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on. Thus, in *The Passenger Cases*, 7 How. 445, the laws of New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports for every passenger landed. In the *Wheeling Bridge Case*,

13 id. 518, the statute of Virginia authorized the erection of a bridge, which was held to obstruct the free navigation of the river Ohio. In the case of *Sinnot v. Davenport*, 22 id. 227, the Statute of Alabama required the owner of a steamer navigating the waters of the state to file, before the boat left the port of Mobile, in the office of the probate judge of Mobile county, a statement in writing, setting forth the name of the vessel, and of the owner or owners, and his or their place of residence and interest in the vessel, and prescribed penalties for neglecting the requirement. It thus imposed conditions for carrying on the coasting trade in the waters of the state in addition to those prescribed by congress. And in all the other cases where legislation of a state has been held to be null for interfering with the commercial power of congress, as in *Brown v. Maryland*, 12 Wheat. 425; *State Tonnage Tax Cases*, 12 Wall. 204, and *Welton v. Missouri*, 91 U. S. 275, the legislation created, in the way of tax, license, or condition, a direct burden upon commerce, or in some way directly interferred with its freedom."

Sherlock et al. v. Alling, 93 U. S. 102-3.

The state law attempts clearly to impose a burden and restraint upon interstate and foreign commerce and to regulate navigation—subjects exclusively within the power of congress whenever it has acted. The state law in question is taken substantially from the state inspection law of New York, but an examination of the New York law shows that it does not at-

tempt to inspect in that state other than steam vessels upon its own waters, not inspected by federal authorities. By its own limitations the New York law confines inspection in that state to steam vessels upon its inland waters.

By taking this construction of the law, conceding the acts of congress to be exclusive over the waters of the United States, and the act of the state of Washington exclusively upon the inland lakes and rivers, no conflict of authority can occur and the owners of vessels will be relieved of the embarrassing position of dealing with conflicting authorities.

You are therefore advised to limit the application of the state inspection law to such vessels as it covers, which operate upon the inland lakes and rivers of the state of Washington not having any navigable outlet to the sea.

INDEX

	Page
Statutes and regulations involved	2
Statement	2
Argument	5
Conclusion	14
Appendix	15

CITATIONS

Cases:	
Anderson v. *Pacific Coast Steamship Co.*, 225 U. S. 187	8
Clyde Mallory Lines v. *Alabama*, 296 U. S. 261	12
Covington, & Bridge Co. v. *Kentucky*, 154 U. S. 204	12
Foster v. *Davenport*, 22 How. 244	5
Gilvary v. *Cuyahoga Valley Ry.*, 292 U. S. 57	12
Harman v. *Chicago*, 147 U. S. 396	6
Moran v. *New Orleans*, 112 U. S. 69	6
Napier v. *Atlantic Coast Line*, 272 U. S. 605	12
Southern Ry. Co. v. *Railroad Commission*, 236 U. S. 439	11
Statutes:	
Motorboat Act of June 9, 1910, c. 268, 36 Stat. 462–463: Secs. 1, 2, 3, 4, 5, 6, 7, and 8	15–19
Act of June 20, 1936, c. 628, 49 Stat. 1544	7, 21
Revised Statutes:	
Sec. 4178	20
Secs. 4399–4462, Title LII	6
Sec. 4426	8, 19
U. S. C., Title 33, Secs. 154–232	7
U. S. C., Title 46, Sec. 46	7
Inspection Laws of State of New York, McKinney's Cons. Laws of New York, Ann., Vol. 36, pp. 11–38	13
Municipal Ordinances No. 20 of Avalon, California, passed January 9, 1934	13
Revised Code of Montana Ann., 1935, Secs. 3859–3879	13
Miscellaneous:	
45 Cong. Rec. 5404–5405, 5687–5691, 6358–6359	9
H. Rept. 1162, 61st Cong., 2d sess	9
H. Rept. 1430, 61st Cong., 2d sess	9
Regulations of the Secretary of Commerce, as revised December 1, 1936	22
Report No. 1321 of the House Committee on Merchant Marine on S. 2001, 74th Cong., 1st sess	2
Sen. Com. Rept. 587, 61st Cong., 2d sess	9
S. 2580, 75th Cong., 1st sess	10

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 2

E. PAT KELLY, AS DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON; JAY OLINGER, AS SUPERVISOR OF THE SAFETY DIVISION OF SAID DEPARTMENT, AND HOWELL PARKER, AS DEPUTY DIRECTOR UNDER THE TITLE MARINE INSPECTOR, PETITIONERS

v.

STATE OF WASHINGTON ON THE RELATION OF FOSS COMPANY, INC., A CORPORATION; ALLMAN-HUBBLE TUGBOAT COMPANY, INC., A CORPORATION; BELLINGHAM TUG & BARGE CO., INC., A CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM OF THE UNITED STATES AMICUS CURIAE

This case was assigned for reargument, with direction to the Clerk to give notice to the Attorney General of the United States, who was requested to present the views of the Government upon the question whether Chapter 200 of the Laws of 1907

of the State of Washington or the action of the officers of the State thereunder conflicts with the authority of the United States or with the action of its officers under the Acts of Congress. This memorandum is submitted in response to that request.

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the Federal statutes and regulations involved are set forth in the Appendix, *infra,* pp. 14–26.

STATEMENT

The respondents here own and operate 139 motor-driven tugs, of which 111 are less than 65 feet in length. Some are registered and the remainder are enrolled and licensed under Federal Laws (R. 140).[1] Some of them tow to and from Washington ports and ports of British Columbia, Oregon, and California (R. 140, 141). They operate mostly upon the inland navigable waters of the United States within the State of Washington, moving vessels engaged in interstate and foreign commerce and engaging in other work about the harbors where they are stationed; but some of them go upon the high seas, and practically all of them are capable of engaging in interstate or foreign commerce, and will do so if and when opportunity offers (R. 141, 143).

[1] From Report No. 1321 of the House Committee on Merchant Marine on S. 2001, 74th Congress, First Session, it appears that there are 772 vessels of 819,935 tons of the motor-driven class in the United States.

The application for writ of prohibition filed by the owners of these motor tugboats in the State Court seeks to restrain the enforcement against such vessels of Chapter 200 of the Laws of 1907 of the State of Washington which contains a comprehensive code for the inspection of every vessel operated by machinery which is not subject to inspection under the laws of the United States (R. 22, 141). The State authorities concede that they have no authority to enforce on *all* waters within the territorial boundaries of the State *all* of the provisions of the State Act of 1907 (such as those pertaining to the rules of the road), but do propose to require the owners of these motor-driven tugs to comply with those laws of the State in the following particulars (R. 141, 142):

> (a) Submit such vessels to inspection annually or oftener if the director shall deem it reasonable, at a cost to said owners of not less than five nor more than twenty dollars for each inspection.
>
> (b) Make such changes, repairs, and improvements as said director may thereupon require.
>
> (c) Carry such officers on said vessels as the director shall after examination license as masters, pilots, and engineers.
>
> (d) Carry such crews as he shall deem necessary to manage each vessel with safety.
>
> (e) Carry such life saving equipment as he shall require and approve.
>
> (f) Carry such fire prevention apparatus as he shall require and approve.

(g) Keep on board at all times a copy of the license to be issued by the director authorizing the vessels to navigate in and upon the waters within the territorial limits of the state, the same to be posted in a conspicuous place.

(h) Keep a copy of the first twenty-two sections of the act posted in a conspicuous place on said vessel.

(i) Keep two copies of the navigation rules set out in section 8 of the act posted in the vessel, one in the pilot house, the other in a conspicuous place.

(j) Keep the vessel's name painted on her stern in the character and colors prescribed by section 16 of the act.

(k) Comply with all orders regulations, and requirements of the Commissioner (Sec. 25).

It was the position of the State that, as the Federal Government had not passed legislation specifically requiring annual inspection of these motor tugs or provided for the licensing of persons in charge thereof, the Federal Government could not be said to have completely occupied the field and that the State, therefore, could properly legislate upon such matters not expressly provided for by the Federal laws.

The Superior Court of the State dismissed the application for the writ (R. 137). The Supreme Court of the State, by a majority opinion, reversed (R. 140–146). The opinion states that "in the twenty-nine years since its enactment no real at-

tempt has been made to enforce it [the act] against those operating vessels of any kind upon the navigable waters of the United States until the present controversy arose" (R. 146).

ARGUMENT

As found by the Supreme Court of Washington, some of the vessels involved in the case at bar operate in foreign and interstate commerce, and practically all can and will do so when opportunity offers, though the main business of most of them is confined to towing vessels which themselves move in interstate and foreign commerce. It may be observed at the outset that the reach of Federal power extends alike to vessels engaged in any of these pursuits. As the Court stated in *Foster* v. *Davenport,* 22 How. 244, 246:

> It is quite apparent from the facts admitted in the case, that this steamboat was employed in aid of vessels engaged in the foreign or coastwise trade and commerce of the United States, either in the delivery of their cargoes, or in towing the vessels themselves to the port of Mobile. The character of the navigation and business in which it was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels assisted to their port of destination. The case, therefore, is not distinguishable in principle from the one above referred to.

This doctrine was reaffirmed in *Moran* v. *New Orleans,* 112 U. S. 69, 73, and *Harman* v. *Chicago,* 147 U. S. 396, 406.

It is the position of the United States that the state legislation as here construed and proposed to be applied is in conflict with the authority of Congress as presently exercised.

The state authorities propose to subject respondents' motor-driven tugs to the requirements of state law as to inspection of vessels, repairs, licensing and number of personnel, life-saving equipment, fire-prevention apparatus, posting of the vessel's license and copies of the state act and regulations, display of the vessel's name, and, generally, to the regulations and requirements of the state commissioner.

Congressional legislation with respect to vessels on the navigable waters of the United States is comprehensive. With respect to steam vessels the provisions of Federal law are extremely detailed.[2]

[2] The Acts of Congress, providing a complete system for the inspection and manning of steam vessels (and substantially covering the same field as Chapter 200 of the Washington Laws of 1907), appeared as Title LII of the Revised Statutes, Sections 4399–4462, and as amended have been carried over into the Code (U. S. C., Title 46, Sections 361–416; c. 61, 48 Stat. 125).

They provide in detail for the complete inspection of hulls and machinery (*id.*, Secs. 391, 392); the issuance of certificates of inspection to be carried aboard the vessels (*id.*, Secs. 399, 404, 405); the licensing of officers (*id.*, Secs. 222, 223); designation of crews to be carried (*id.*, Sec. 222), with number of able seamen and certificated lifeboat men required (*id.*, Sec. 222), as well as the full complement of the crew

The provisions as to inspection of steam vessels have recently been made applicable to sea-going motor vessels of 300 gross tons and over, except vessels engaged in the fishing industry (Act of June 20, 1936, c. 628, 49 Stat. 1544, *infra*, p. 21). Federal legislation regulating other motor driven boats is less stringent with respect to inspection, but its provisions plainly reveal that Congress has addressed itself to the problem of regulation of such vessels and has legislated to the extent deemed necessary in the interest of the public and of the owners and crew.

The Motor Boat Act of 1910 (*infra*, p. 15), together with the regulations of the Secretary of Commerce issued pursuant thereto (*infra*, p. 22) contains the principal, though not the only, applicable provisions. A motor boat is defined in the Act as including every vessel propelled by machinery and not more than 65 feet in length, except tug boats and tow boats propelled by steam. As will

(*id.*, Sec. 222); regulation of the number of passengers to be carried (*id.*, Secs. 451, 452); provision for the carriage of dangerous cargoes (*id.*, Secs. 465–468); precautions against fire to be observed by vessels carrying passengers and freight (*id.*, Sec. 463); and additional provision for the transportation of explosives and dangerous substances (*id.*, supp. 391–a). Acts of Congress also provide a complete set of rules of the road—lights to be carried, etc.—governing navigation upon the navigable waters here concerned (U. S. C., Title 33, Sections 154–232). Every documented vessel is required to have her name marked on each bow and upon the stern, with the name of her home port (U. S. C., Title 46, Sec. 46). Penalties are provided for non-compliance with the various provisions.

13267—37——2

appear, however, several important provisions are made applicable also to motor vessels of more than 65 feet in length. All motor boats of 5 net tons or over engaged in trade must be documented—that is, licensed by the Collector of Customs (Regulation 16, p. 26, *infra*). As stated by the Supreme Court of Washington, all the vessels involved in the case at bar are in fact registered or enrolled and licensed under Federal laws (R. 140).[3] All motor boats as defined in the Act, as well as all other motor boats propelled otherwise than by steam, whether under or over 65 feet in length, which are of over 15 gross tons and which carry passengers or freight for hire, excepting those engaged in fishing as a regular business, are subject to inspection (R. S. 4426, as amended, p. 19, *infra;* Regulation 15, p. 26, *infra*). The difference thus drawn, with respect to inspection, between carriers for hire and other motor vessels, is drawn also with respect to licensing of personnel. Motor boats carrying passengers for hire must carry, as the officer in charge, a person licensed for such service by the local Federal Board of Inspectors (Section 5 of the Act of 1910, p. 17, *infra*). The Act specifically provides, however, that "motor boats shall not be required to carry licensed officers, except as required in this Act" (*ibid.*). Thus the motor tugs here involved are relieved of the necessity of carrying a licensed

[3] The distinction between registry and enrollment is discussed in *Anderson* v. *Pacific Coast Steamship Company*, 225 U. S. 187, 199.

operator. The exemption is specific and constitutes an affirmative Federal rule.[4]

The Act and Regulations make definite provision for life-saving and fire-extinguishing equipment and describe the approved types (Sections 5 and 6, pp. 17, 18, *infra;* Regulations 13–14, pp. 23–25, *infra*). It is to be noted that these provisions apply to motor driven vessels whether more or less than 65 feet in length. While the requirements as to life-saving equipment imposed by the statute (Section 5) and the Regulations (No. 13) differ as to motor boats carrying passengers for hire and those not so engaged, in either case the requirements are definitely fixed. The regulations also require motor boats to have on board two copies of the pilot rules to be observed by them, which will be furnished by the Collectors of Customs and local inspectors, Bureau of Marine Inspection and Navigation; copies of the Act and Regulations are to be inserted therein (Regulations 17, p. 26, *infra*). All documented vessels of the United States (including all involved in the present case) must be marked with their name and the home port in specified lettering (R. S., Sec. 4178, p. 20, *infra*).

[4] Neither in the Committee Reports on the Motor Boat Act of 1910 (Senate Committee Report No. 587; House Reports Nos. 1162, 1430, 61st Congress, Second Session) nor in the debates was reference made to state regulation. The discussion was devoted to the broad question of the extent to which regulations respecting safety equipment and personnel might appropriately be imposed upon motor boats. 45 Cong. Rec., 5404–5405, 5687–5691, 6358–6359.

It must be evident that Federal regulation of motor vessels is a carefully articulated system, and that to the extent that it does not parallel the regulation of steam vessels, the differences reflect the deliberate policy of Congress.[5] It must also be evident, we believe, that the state regulations here sought to be applied invade a field already occupied by Federal authority.

Principles long established by this Court require that the state regulations be held inoperative in the

[5] The Senate, by its passage on August 14, 1937, of S. 2580, has indicated its view that now every existing vessel documented under the laws of the United States should be inspected. The bill would amend existing laws so as to promote safety at sea by requiring proper design, construction, maintenance, inspection, and operation of ships. It defines a ship or a vessel as including "every description of watercraft or other artificial contrivance, except aircraft, used, or capable of being used, as a means of transportation on water, whether or not it is actually afloat." (Sec. 301.) All vessels documented under the laws of the United States are divided into five groups, one of which includes vessels navigating bays, sounds, and protected waters, and the Bureau of Marine Inspection and Navigation is authorized to subdivide each group in accordance with types of ships. Among the subgroups provided for is "towing vessel" (Sec. 401 (a) (4), Sec. 402). Every existing vessel documented under the laws of the United States (which would include respondents' tugboats) would be subject to a periodical inspection by the Bureau to be made at least once every year and to additional inspections to be made whenever necessary (Sec. 602).

S. 2580 was referred on August 17, 1937, to the Committee on Merchant Marine and Fisheries in the House of Representatives, but was not reported out by that Committee before the adjournment of the Congress on August 21, 1937.

case at bar. The Federal and state regulations alike cover the licensing and manning of motor vessels, and the type and fitness of their safety equipment. The regulations operate upon the same subject and they have the same object. The situation is thus comparable to that under the Federal safety appliance laws as described in *Southern Ry. Co.* v. *Railroad Commission,* 236 U. S. 439, 446–447:

> But so far as it did legislate, the exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employes. The States thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties. For, as said in *Prigg* v. *Commonwealth,* 16 Pet. 539, 617: "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what

> its intention is as the direct provisions made by it * * * the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed."

In the circumstances here disclosed the state law can not be given effect, "however commendable" its aims (*Napier* v. *Atlantic Coast Line,* 272 U. S. 605, 613), and whether its operation would be "consistent, complementary, additional or otherwise" in relation to the Federal regulations (*Gilvary* v. *Cuyahoga Valley Ry.,* 292 U. S. 57, 60–61).

The case is not governed by decisions dealing with local harbor regulations, port pilotage, quarantine, and the like, which may be proper subjects of local regulation where they do not burden interstate commerce and where they do not deal with matters which have been made the subject of Federal regulation. Cf. *Clyde Mallory Lines* v. *Alabama,* 296 U. S. 261, 267; *Covington & Bridge Co.* v. *Kentucky,* 154 U. S. 204, 211. In the first place, the state law here in question is not confined in its application to harbor traffic, but, under the construction urged by petitioners here, is applicable to motor vessels as such on all navigable waters within the State. And in the second place, in any event, Congressional legislation has dealt with the same subject and is paramount.

The Department of Commerce, in which is lodged the administration of the Federal inspection laws, advises that from time to time cases have arisen

wherein States have attempted to enforce their own inspection laws,[6] concurrently with the enforcement of the Federal laws, upon vessels employed on the navigable waters of the United States, and that in all such cases the Department has insisted that the Federal authorities have exclusive jurisdiction. It considers the opinion of the Supreme Court of Washington in this case sound, and its firm position is that the United States has exclusive jurisdiction, in the particulars here concerned, over motor tugs operating on the navigable waters of the United States in the State of Washington. It is submitted that this position is correct. Otherwise the States or municipalities or other subdivisions of the States may provide independent inspection laws, with varying requirements, leading to subversive conflict, duplication and confusion.

It is significant that before Chapter 200 of the Washington Laws of 1907 became effective, the Attorney General of the State ruled that it should be construed to apply only to vessels operating upon the inland lakes and rivers of the State of Washington (Respondent's Brief 31); and that it was not until 1934 that the State attempted to enforce it upon navigable waters of the United States (*id.*, Appendix A).

[6] Revised Code of Montana, Ann., 1935, Secs. 3859–3879; Municipal Ordinances No. 20 of the City of Avalon, California, passed Jan. 9, 1914; Inspection Laws of the State of New York, McKinney's Cons. Laws of New York, Ann., Vol. 36, pp. 11–38.

CONCLUSION

It is respectfully submitted that the decree of the Supreme Court of Washington should be affirmed.

STANLEY REED,
Solicitor General.
GOLDEN W. BELL,
Assistant Solicitor General.
SAM E. WHITAKER,
Assistant Attorney General.
J. FRANK STALEY,
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SEPTEMBER 1937.

APPENDIX

The Motorboat Act of June 9, 1910, c. 268, 36 Stat. 462–463 (U. S. C., Title 46, Sections 511–518) provides:

That the words "motor boat" where used in this Act shall include every vessel propelled by machinery and not more than sixty-five feet in length, except tugboats and towboats propelled by steam. The length shall be measured from end to end over the deck, excluding sheer: *Provided,* That the engine, boiler, or other operating machinery shall be subject to inspection by the local inspectors of steam vessels, and to their approval of the design thereof, on all said motor boats, which are more than forty feet in length, and which are propelled by machinery driven by steam.

SECTION 2. That motor boats subject to the provisions of this Act shall be divided into classes as follows:

Class 1. Less than twenty-six feet in length.

Class 2. Twenty-six feet or over and less than forty feet in length.

Class 3. Forty feet or over and not more than sixty-five feet in length.

SECTION 3. That every motor boat in all weathers from sunset to sunrise shall carry the following lights, and during such time no other lights which may be mistaken for those prescribed shall be exhibited.

(a) Every motor boat of class 1 shall carry the following lights:

First. A white light aft to show all around the horizon.

Second. A combined lantern in the forepart of the vessel and lower than the white light aft showing green to starboard and red to port, so fixed as to throw the light from right ahead to two points abaft the beam on their respective sides.

(b) Every motor boat of classes 2 and 3 shall carry the following lights:

First. A bright white light in the forepart of the vessel as near the stem as practicable, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side. The glass or lens shall be of not less than the following dimensions:

Class 2. Nineteen square inches.

Class 3. Thirty-one square inches.

Second. A white light aft to show all around the horizon.

Third. On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side. On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side. The glasses or lenses in the said side lights shall be of not less than the following dimensions on motor boats of—

Class 2. Sixteen square inches.

Class 3. Twenty-five square inches.

On and after July 1, 1911, all glasses or lenses prescribed by paragraph (b) of section three shall be fresnel or fluted. The said lights shall be fitted with inboard screens of sufficient height and so set as to prevent these lights from being seen across the bow and shall be of not less than the following dimensions on motor boats of—

Class 2. Eighteen inches long.

Class 3. Twenty-four inches long: *Provided,* That motor boats as defined in this Act, when propelled by sail and machinery or under sail alone, shall carry the colored lights suitably screened but not the white lights prescribed by this section.

SECTION 4. (a) Every motor boat under the provisions of this Act shall be provided with a whistle or other sound-producing mechanical appliance capable of producing a blast of two seconds or more in duration, and in the case of such boats so provided a blast of at least two seconds shall be deemed a prolonged blast within the meaning of the law.

(b) Every motor boat of class 2 or 3 shall carry an efficient fog horn.

(c) Every motor boat of class 2 or 3 shall be provided with an efficient bell, which shall be not less than eight inches across the mouth on board of vessels of class 3.

SECTION 5. That every motor boat subject to any of the provisions of this Act, and also all vessels propelled by machinery other than by steam more than sixty-five feet in length, shall carry either life preservers or life belts, or buoyant cushions, or ring buoys or other device, to be prescribed by the Secretary of Commerce, sufficient to sustain afloat every person on board and so placed as to be readily accessible. All motor boats

carrying passengers for hire shall carry one life preserver of the sort prescribed by the regulations of the Board of Supervising Inspectors for every passenger carried, and no such boat while so carrying passengers for hire shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors. No examination shall be required as the condition of obtaining such a license, and any such license shall be revoked or suspended by the local board of inspectors for misconduct, gross negligence, recklessness in navigation, intemperance, or violation of law on the part of the holder, and if revoked the person holding such license shall be incapable of obtaining another such license for one year from the date of revocation: *Provided,* That motor boats shall not be required to carry licensed officers, except as required in this Act.

SECTION 6. That every motor boat and also every vessel propelled by machinery other than by steam, more than sixty-five feet in length, shall carry ready for immediate use the means of promptly and effectually extinguishing burning gasoline.

SECTION 7. That a fine not exceeding $100 may be imposed for any violation of this Act. The motor boat shall be liable for the said penalty and may be seized and proceeded against, by way of libel, in the district court of the United States for any district within which such vessel may be found.

SECTION 8. That the Secretary of Commerce shall make such regulations as may be necessary to secure the proper execution of this Act by collectors of customs or other officers of the Government. And the Secretary of the Department of Commerce

may, upon application therefor, remit or mitigate any fine, penalty, or forfeiture relating to motor boats except for failure to observe the provisions of section 6 of this Act.

* * * * *

R. S. 4426, as amended (U. S. C., Title 46, Section 404), provides:

The hull and boilers of every ferry-boat, canal boat, yacht, or other small craft of like character propelled by steam, shall be inspected under the provisions of this chapter. Such other provisions of law for the better security of life as may be applicable to such vessels shall, by the regulations of the board of supervising inspectors, also be required to be complied with before a certificate of inspection shall be granted, and no such vessel shall be navigated without a licensed engineer and a licensed pilot: *Provided, however,* That in open steam launches of ten gross tons and under, one person, if duly qualified, may serve in the double capacity of pilot and engineer. All vessels of above fifteen gross tons carrying freight or passengers for hire, but not engaged in fishing as a regular business, propelled by gas, fluid, naphtha, or electric motors, shall be subject to all the provisions of this section relating to the inspection of hulls and boilers and requiring engineers and pilots, and for any violation of the provisions of this or the following chapter or sections 214, 216, or 222 applicable to such vessels, or of rules or regulations lawfully established thereunder, and to the extent to which such provisions of law and regulations are so applicable, the said vessels, their masters, officers, and owners shall be subject to the provisions of sections 494 to 498, inclusive, relating to the imposi-

tion and enforcement of penalties and the enforcement of law. All vessels of fifteen gross tons or less propelled in whole or in part by gas, gasoline, petroleum, naphtha, fluid, or electricity and carrying passengers for hire, shall carry one life preserver, of the sort prescribed by the regulations of the board of supervising inspectors, for every passenger carried, and no such boat while so carrying passengers shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors. No examination shall be required as a condition of the obtaining of such a license, and any such license shall be revoked or suspended by the local board of inspectors for misconduct, gross negligence, recklessness in navigation, intemperance, or violation of law on the part of the holder, and if revoked, the person holding such license shall be incapable of obtaining another such license for one year from the date of revocation.

R. S., Sec. 4178, as amended (U. S. C., Title 46, Section 46) provides:

The name of every documented vessel of the United States shall be marked upon each bow and upon the stern, and the home port shall also be marked upon the stern. These names shall be painted or gilded, or consist of cut or carved or cast roman letters in light colors on a dark ground, or in a dark color on a light ground, secured in place, and to be distinctly visible. The smallest letters used shall not be less in size than four inches. If any such vessel shall be found without these names being so marked the owner or owners shall be liable to a penalty of $10 for each name omitted.

The Act of June 20, 1936, c. 628, 49 Stat. 1544, provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That existing laws covering the inspections of steam vessels be, and they are hereby, made applicable to seagoing vessels of three hundred gross tons and over propelled in whole or in part by internal-combustion engines to such extent and upon such conditions as may be required by the regulations of the Board of Supervising Inspectors of Steam Vessels, with the approval of the Secretary of Commerce: *Provided,* That this Act shall not apply to any vessel engaged in fishing, oystering, clamming, crabbing, or any other branch of the fishery or kelp or sponge industry: *Provided further,* That as to licenses required for masters and engineers operating vessels propelled by internal-combustion engines operating exclusively in the district covering the Hawaiian Islands, said masters and engineers shall be under the jurisdiction of the hull and boiler inspectors having jurisdiction over said waters, who shall make diligent inquiry as to the character, merits, and qualifications, and knowledge and skill of any master or engineer applying for a license. If the said inspectors shall be satisfied from personal examination of the applicant and from other proof submitted that the applicant possesses the requisite character, merits, qualifications, knowledge, and skill, and is trustworthy and faithful, they shall grant him a license for the term of five years to operate such vessel under the limits prescribed in the license.

Sec. 2. The term "seagoing vessels" as used in the preceding section shall be construed to mean vessels which in the usual course of their employment proceed outside the line dividing the inland waters from the high seas as designated and determined under the provisions of section 2 of the Act of February 19, 1895.

Regulations of the Secretary of Commerce, as revised December 1, 1936, issued pursuant to Section 8 of the Motor Boat Act of June 9, 1910 (published in Federal Register, Dec. 1, 1936, Vol. I, p. 2055), provide in pertinent part as follows:

REGULATIONS

1. All violations of the above act detected by enforcement officers other than collectors of customs must be reported directly to the Department of Commerce (Bureau of Marine Inspection and Navigation) regardless of mitigating circumstances, as authority to mitigate and remit the penalties under the laws mentioned is vested solely in the Secretary of Commerce. Such reports must be forwarded to the Bureau of Marine Inspection and Navigation in triplicate. The use of the report forms heretofore used in making such reports to collectors of customs is authorized.

2. The act defines the words "motor boat" (i. e., the class of vessels subject to its requirements) as including every vessel propelled by machinery and not more than 65 feet in length, except tugboats and towboats propelled by steam. The term, therefore, includes boats temporarily or permanently equipped with detachable motors, and such vessels, when so equipped, are subject to this act.

LIGHTS

* * * * *

WHISTLE, FOG HORN, AND BELL

* * * * *

LIFE PRESERVERS AND LIFE-SAVING DEVICES

ON MOTOR BOATS NOT CARRYING PASSENGERS FOR HIRE

13. Every motor boat not carrying passengers for hire must have life preservers or life belts, or buoyant cushions, or ring buoys, or other devices in sufficient numbers to provide one for each person on board. This includes members of the crew, children, and babies. No such life preserver, life belt, buoyant cushion, ring buoy, or other device is approved for more than one person each.

The Department authorizes life preservers, life belts, buoyant cushions, and ring buoys for motor boats not carrying passengers for hire under the following conditions: Each such device shall be capable of sustaining afloat for a continuous period of 24 hours an attached weight so arranged that whether the said weight is submerged or not there shall be a direct downward gravitational pull upon such device of at least 20 pounds. Each such device must either be approved by the Board of Supervising Inspectors, or it must have attached a tag on which is stated the name and address of the manufacturer, the weight and contents of the device, and that it complies with the requirements of section 5 of the act of June 9, 1910, for motor boats not carrying passengers for hire. Every such device must have at least two strong straps securely attached to it in such a manner that they will not break or be torn loose under ordinary conditions, of sufficient length and so arranged that they may be

slipped over the arms of the wearer to the shoulders.

No such life preservers, life belts, buoyant cushions, ring buoys, or other device stuffed or filled with granulated cork or other loose granulated material, and no pneumatic life preservers, life belts, buoyant cushions, ring buoys, or other device will be approved.

Planks, gratings, flooring, oars, corks on fish nets, empty kegs or casks, wooden boxes, boats in tow, etc., are not approved as substitutes for life preservers, life belts, buoyant cushions, ring buoys, but wooden life floats made of light buoyant wood may be used on motor boats navigating not more than three miles offshore and not carrying passengers for hire. The dimensions of every such wooden life float shall be not less than 4 feet in length, 12 inches in width, and 1¾ inches in thickness, and the weight shall not exceed 25 pounds. The float may be made in one or two pieces. If made in two pieces, they shall be securely attached together with wooden dowels. No metal shall be used in the construction of the float. It shall be provided with two hand-holes, one at each side, midway in the length, which hand-holes shall be not less than 6 inches in length and 2 inches in width, with a margin of at least 1 inch at the edge of the float. Wooden life floats, made of balsa wood shall not be less than 3 feet in length, 11½ inches in width, and 2 inches in thickness. The balsa wood used in the construction of such floats shall be of the same quality as required for the balsa wood life preservers. Each two-piece float, in addition to the doweling, shall be securely glued and the dowels shall be four in number of ¾-inch diameter, made of straight-grained dry hardwood, driven through and entirely across the float

through holes bored to slightly less diameter than the dowel. Life floats already installed on motor boats and constructed in accordance with previous regulations may continue to be used.

ON MOTOR BOATS CARRYING PASSENGERS FOR HIRE

Motor boats carrying passengers for hire shall carry one life preserver of the sort prescribed by the Board of Supervising Inspectors for every passenger carried, and the person in charge must be duly licensed.

Motor boats hired at launch liveries and operated by the liveryman or his employee are construed as carrying passengers for hire; but if the motor boat is operated by the hirer himself, it is not considered a carriage of passengers for hire even though he may take other persons on board, provided, of course, he does not receive compensation for carrying these other persons.

FIRE-EXTINGUISHING APPARATUS

14. Fire extinguishers of a type which have demonstrated their ability to "promptly and effectually extinguish burning gasoline" must be carried on all motor boats when being navigated. Extinguishers of the carbon dioxide, carbon tetrachloride, and foam types have demonstrated their capacity for promptly and effectually extinguishing burning gasoline. Extinguishers of any of these types which are full and in working condition, and which are of sufficient size to be effective, may be considered as being in compliance with the law. Neither soda and acid type extinguishers, sand, nor salt and sand, have been found to be capable of promptly and effectually extinguishing burning gasoline.

LICENSED OFFICERS, AND INSPECTION

15. In lieu of the inspection of steam vessels now provided by sections 4417, 4418, and 4426, Revised Statutes, it is now required that, after due inspection or personal observation, the design of the engine, boiler, or other operating machinery of motor boats more than 40 feet in length and not more than 65 feet in length, propelled by machinery driven by steam, shall be approved by the local inspectors.

All steam vessels more than 65 feet in length are subject to inspection as heretofore.

Motor boats propelled otherwise than by steam of above 15 gross tons carrying freight or passengers for hire, but not engaged in fishing as a regular business, are subject to inspection whether under or over 65 feet in length.

The only officer required to be carried on motor boats within the contemplation of the act of June 9, 1910, is the licensed operator provided for in the act.

DOCUMENTS AND NAME

16. All motor boats of 16 gross tons or over used exclusively for pleasure should be documented as yachts; all motor boats of 5 net tons or over engaged in trade must be documented—i. e., licensed by the Collectors of Customs. Vessels under 5 net tons are not registered, enrolled, or licensed in any case. The license of the vessel (designated a document) obtained from the Collector of Customs is additional to and must not be confounded with the license required for the operator of a motor boat.

17. Motor boats are required to have on board two copies of the pilot rules to be

observed by them, which will be furnished by the Collectors of Customs and Local Inspectors, Bureau of Marine Inspection and Navigation, on request. Copies of this circular should be inserted therein.

U. S. GOVERNMENT PRINTING OFFICE: 1937

No. 2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1937

R. PAT KELLY et al, Petitioners

v.

STATE OF WASHINGTON et al, Respondents

MEMORANDUM OF RESPONDENTS RE FEDERAL INSPECTION OF VESSELS.

GENERAL

A. All vessels, regardless of tonnage, size, or manner of propulsion, and whether self propelled or not, and whether carrying freight or passengers for hire or not that shall have on board any inflammable or combustible liquid cargo in bulk, except public vessels owned by the United States, other than those engaged in commercial service, shall be considered steam vessels, and are subject to the provisions of Title 52 of the Revised Statutes. (Title 46 U.S.C., Sec. 391a).

B. All vessels, regardless of size or rig, transporting inflammable explosive or like dangerous cargo are subject to inspection to determine that such cargo may be carried with safety. (49 Stat. 868)

1. Steam vessels subject to all the inspection laws of Title 52.

   (a) All steam vessels of 65' in length and over.

   (b) Tugboats and Towboats propelled by steam regardless of size or tonnage.

   (c) Vessels described in general heading paragraph A and B.

2. Steam vessels which are subject to some of the inspection laws of Title 52.

   (a) All steam vessels over 40' and under 65' in length excepting those designated under the "General" heading paragraph A.

   (b) Vessels described in general heading paragraph B.

3. Motor vessels which are subject to all of the inspection laws of Title 52.

   (a) All seagoing vessels propelled by internal combustion engines of over 300 gross tons.

   (b) All motor vessels as described under the "General" heading paragraph A.

4. Motor vessels which are subject to some of the inspection laws of Title 52 (except as noted under "General"), paragraph A.

   (a) Motor boats of over 15 gross tons and under 65' in length carrying freight or passengers for hire.

   (b) Motor vessels of over 15 gross tons and over 65' in length carrying freight or passengers for hire, excepting Section 3 paragraph A.

   (c) Vessels described in general heading paragraph B.

5. Miscellaneous vessels subject to the inspection laws of Title 52.

   (a) Seagoing barges of 100 gross tons and over.

   (b) All sailing vessels carrying passengers for hire of over 700 gross tons.

   (c) All vessels designated under the "General" heading Paragraph A.

(d) All vessels and barges of over 100 tons burden carrying passengers for hire.

6. Miscellaneous vessels subject to some of the inspection laws of Title 52.

(a) All passenger barges of 100 gross tons and under while in tow of steam vessels.

(b) Vessels described in general heading paragraph B.

7. Miscellaneous provisions.

(a) Numbering of undocumented vessels and vessels not exceeding sixteen feet in length, temporarily equipped with detachable motors. [U.S.C. Title 46, Sec. 288]

(b) Documented vessels. Name and home port on bow and stern. Application to licensed vessel. Draft marked on stem and stern posts of registered vessels. [U.S.C. Title 46, Secs. 46, 48, and 287]

(c) Sprinkler system required on passenger vessels having accommodation for 50 or more passengers. [49 Stat. 1540, U.S.C. Title 46, Sec. 464]

(d) Radio equipment and radio operators. Radio installation in charge of qualified operators required on every ship of the United States, other than a cargo ship of less than 1600 tons when navigated in the open sea outside of a harbor or port. Direction finder on certain passenger vessels. Provisions applicable to certain cargo vessels. Requirements for radio operators. (Public No. 97, 75th Cong., Act of May 20, 1937)

(e) Rules of the Road.

(1) International Rules. (U.S.C. Title 33, Secs. 61-141)

(2) Inland Rules. (U.S.C. Title 33, Secs. 151-222)

(3) Rules for the Great Lakes. (U.S.C. Title 33, Secs. 241-293)

(4) Rules for the Red River of the North and

rivers emptying into Gulf of Mexico and tributaries. (U.S.C. Title 33, Secs. 301-351)

8. "Motor Boats" as defined in Motor Boat Act of 1910, Appendix, p. 15, Government's Brief, subject to Federal Regulation and inspection in some particulars.

(a) Engine, boiler or other operating machinery of "Motor Boats" more than 40 feet in length, and not more than 65 feet in length, propelled by machinery driven by steam. (Sec. 1(a) above) (U.S.C. Title 46, Sec. 511)

(b) Lights, fog horn, whistle, bell, life preservers for each person on board and means of extinguishing fire. (U.S.C., Title 46, Secs. 512-516)

(c) Life preserver for each passenger carried. (U.S.C., Title 46, Sec. 515)

(d) Required to carry two copies of pilot rules. (Regulations, Department of Commerce.)

(e) "Motor boats shall not be required to carry licensed officers, except as required in this chapter." (June 9, 1910, c. 268, sec. 5, 36 Stat. 463; Mar. 4, 1913, c. 141, sec. 1, 37 Stat. 736; U.S.C., title 46, sec. 515)

(f) Vessels propelled by machinery other than steam more than 65 feet in length shall carry either life preservers or life belts, or buoyant cushions, or ring buoys or other device, to be prescribed by Secretary of Commerce, sufficient to sustain afloat every person on board. (U.S.C., Title 46, sec. 515)

(g) Every vessel propelled by machinery other than steam, more than 65 feet in length, shall carry ready for immediate use the means of promptly and effectively extinguishing burning gasoline. (June 9, 1910, c. 268, sec. 6, 36 Stat. 463; U.S.C., Title 46, sec. 516)

LICENSED OFFICERS AND CREW

9. On Steam Vessels Subject to Inspection.

(a) All steam vessels subject to inspection under Title 52 are required to carry such complement of licensed officers and crew, including certified lifeboat men,

as may in judgment of local inspectors be necessary for safe navigation. (R.S. 4463). This includes masters, chief mates, and second and third mates, if in charge of a watch, engineers and pilots of all steam vessels. (R.S. 4438)

(b) Vessels navigating coastwise and on Great Lakes. (R.S. 4461)

(c) Masters of all other vessels over 100 tons gross carrying passengers for hire (R.S. 4438).

(d) Citizenship of officers and pilots (49 Stat. 1935; U.S.C., Title 46, sec. 672a).

(e) Posting of licenses framed under glass in conspicuous place on vessel. (R.S. 4446)

(f) Watch duty and hours of work of deck officers. (U.S.C., Title 46, sec. 256 and sec. 673, as amended)

(g) License required for master, mates, engineers, pilots and master or mate acting as pilot. (R.S. 4439 - 4445)

(h) One person, if duly qualified, may serve in double capacity of pilot and engineer in open steam launches of ten gross tons and under. (R.S. 4426)

(i) Complement of crew and certificated lifeboat men prescribed by local inspectors. (R.S. 4463)

(j) Definition of certificated lifeboat men. (Act of Mar. 4, 1915, c. 153, sec. 14; U.S.C., Title 46, sec. 481)

(k) Requirements as to watches of crew, hours of work, duties of seamen, on all merchant vessels more than 100 tons gross, excepting those navigating rivers, harbors, lakes (other than Great Lakes), bays, sounds, bayous, and canals exclusively. Special provisions for tugs and barges on voyages of less than 600 miles. (49 Stat. 1954; June 23, 1936, c. 614, sec. 2, U.S.C., Title 46, sec. 673)

(l) Manning of vessels of 100 tons gross and upward, except those navigating rivers exclusively and the smaller inland lakes. (46 U.S.C., sec. 672; Act of June 23, 1936, c. 614, sec. 1, 49 Stat. 1930)

(m) Requirements for able seamen. Certificate of service as a qualified member of the engine department. Not less than 75 per centum of crew must be able to understand any order given by the officers of vessels referred to in (l) above. (U.S.C., Title 46, sec. 672)

(n) Continuous discharge book for every seaman upon a merchant vessel of the United States 100 gross tons and upward, except vessels employed exclusively in trade on the navigable rivers of the United States. (R.S. 4551, as amended, U.S.C., Title 46, sec. 642)

(o) Citizenship of Crews. (U.S.C., Title 46, sec. 672a)

10. On Vessels Propelled by Machinery Other than Steam.

(a) Licensed officers and crews required on all vessels under "General" heading paragraphs A and B, above.

(b) All seagoing vessels propelled by internal combustion engines over 300 gross tons. (U.S.C., Title 46, sec. 367)

(c) Engineers and pilots on vessels over 15 gross tons carrying freight or passengers for hire, but not engaged in fishing. (U.S.C., Title 46, sec. 404)

(d) Licensed operator required on vessels under 15 gross tons carrying passengers for hire. No examination for license. (U.S.C., Title 46, sec. 404)

(e) "Motor Boats" carrying passengers for hire to be in charge of person duly licensed by local board of inspectors. No examination for license required, but license shall be revoked or suspended for misconduct, etc. (Motor Boat Act, 1910, sec. 5, U.S.C., Title 46, sec. 515)

(f) "That motor boats shall not be required to carry licensed officers, except as required in this Act." (Act of June 9, 1910, c. 298, sec. 5, 36 Stat. 463; U.S.C., Title 46, sec. 515)

(g) Crew. Requirement as to watches, etc. on vessels over 100 gross tons. (See No. 9 (k) above)

(h) Manning of vessels, requirements for able seamen and qualified member of engine department. Continuous discharge book. Citizenship of crews. (See No. 9 (l), (m), (n), and (o) above)

11. Sailing Vessels.

(a) Registry, enrollment and license. (U.S.C., Title 46, Secs. 11, 251, 252, 253)

(b) License for masters of sail vessels over 700 gross tons. (U.S.C., Title 46, Sec. 224; R.S. 4438)

(c) Rules of road applicable to sailing vessels. (See No. 7(c) above.)

12. Pending Legislation: Copeland Act, S. 2580, 75th Cong., 1st Session. (Scope and present status set forth on page 10 Memorandum of the United States Amicus Curiae.)

Thorough revision of all laws pertaining to motor boats, vessels under 300 tons propelled by internal combustion engines and smaller steam vessels. (Present status set forth on page 22-1/2 - additional page - respondent's brief, documents there referred filed with the Clerk.)

No. 2

DEPARTMENT OF COMMERCE

BUREAU OF
MARINE INSPECTION AND NAVIGATION
WASHINGTON

June 22, 1936.

CIRCULAR LETTER NO. 111.

TO MEMBERS OF THE MOTORBOATING INDUSTRY,
YACHT CLUBS, AND OTHERS CONCERNED:

The present requirements of law affecting the inspection and operation of motorships and motorboats are inadequate to provide for safety on such vessels. In view of this fact, it is felt that there is a very definite and urgent need for legislation setting up certain minimum requirements as to the inspection and also as to the operating personnel of small craft as well as larger vessels.

There is enclosed herewith a memorandum setting forth the views of the Bureau of Marine Inspection and Navigation on the subject. It will be noted that no provision is made in the memorandum for licensing operators of pleasure craft. While it is felt that such a requirement is very desirable, it seems that a considerable amount of educational work must first be done in order to avoid probable opposition on the part of owners of such boats.

The Bureau will be pleased to receive from you any suggestions, criticisms, or opinions that you may desire to express on this memorandum, or any views you may hold on the subject of legislation which, in your estimation, is desirable for the furtherance of safety on motorboats.

Enclosed herewith is a franked envelope for your reply.

Director.

Enclosure.

16455

MOTOR BOAT MEMORANDUM

May 1, 1936.

REQUIREMENTS FOR THE INSPECTION OF MOTOR VESSELS AND THE EXAMINATION OF THEIR OFFICERS OR OPERATORS

The formulation of just and reasonable rules to control the operation of motor vessels may be based upon the following facts:

The safety of any vessel depends to a very great extent upon her suitability for the trade in which she operates, the adequacy of her outfit, and the condition in which she is kept. To guarantee a reasonable degree of safety, an inspection of some form should be insisted upon for all passenger vessels, and for all other commercial vessels except those of small size.

The responsibility for safe and efficient navigation is the same for all mechanically-propelled vessels. An improperly navigated motor vessel is as great a menace to others as an improperly navigated steamer. It is apparent, however, that a very large proportion of small motor vessels do not require licensed officers as provided for in the present Steamboat Inspection Rules. Many, if not most of these small vessels are being safely and efficiently operated by men who could not possibly meet the present requirements for a license, and this condition has obtained for many years. To insist upon the employment of licensed officers would be an unnecessary hardship for both owners and operators and would not increase safety of operation. To meet this situation, it is proposed that a new class of certificated deck officers or operators be established.

The main threat to safety on steam vessels is the explosion of the ordinary fire-tube or flue boiler. To guard against this, particular care and knowledge is required, so that the present examination of steam engineers is entirely justified.

On motor vessels, except those of large tonnage with donkey boilers, the above risk does not exist. A special form of examination applicable to internal combustion engines should be prepared. A knowledge of steam should not be required. For small motor vessels, "certification" similar to that proposed for deck officers should give satisfactory results and is not believed to be an unreasonable requirement.

Having in mind the foregoing conditions, the following rules applying to motor vessels, are proposed:

1. Inspection -

All motor vessels regularly carrying passengers for pay, and all other commercial vessels of over 15 tons, shall be subject to inspection as to suitability, general condition, equipment, and outfit, as required for the particular service in which they are employed. For passenger vessels, such inspection shall apply in territorial as well as home waters. (As purely a safety provision, there can be no logical objection to it) Inspection of cargo boats, tugs, fishing boats, and other similar craft of less than 15 tons shall, however, not be required.

2. Deck Officers.

A motor-driven passenger vessel, above 200 tons, shall have licensed deck officers the same as are required for steam vessels.

A motor-driven passenger vessel below 200 tons shall have a "certificated" officer or operator in charge who has satisfied the inspector as to his ability to operate the vessel safely in her particular trade and route. Written or oral examination, supplemented by evidence as to character and previous experience, shall be deemed sufficient for the issuance of a certificate, to be known as Certificate A, for deck officers of vessels of not over 200 tons.

All motor boat operators on boats carrying passengers for hire are required (Act of June 9, 1910) to have a license, granted without examination. Hereafter, no license shall be granted where the applicant, by oral examination, is found not to have at least a working knowledge of the Rules of the Road, of steering, running lights, etc. Upon satisfactory proof of the foregoing minimum requirements for safe operation, a certificate, known as Certificate B, may be granted, and required of operators of all commercial vessels, but not of operators of small yachts and pleasure boats.

3. Engineer Officers.

For motor vessels of over 200 tons, a licensed engineer officer or officers shall be required, but the examination for this license shall be a special one applicable to internal combustion engines. No knowledge of steam shall be required. For small motor vessels of less than 200 tons, a certificated engineer or operator shall be required - the certificate to be known as Certificate M. To obtain this certificate, the operator shall qualify as follows:

(a) Sufficient experience and reliability to maneuver the machinery promptly and without error.

(b) Sufficient knowledge of the machinery reasonably to assure its continuous operation.

(c) A thorough knowledge of the hazards involved in the use of liquid fuel; explosion in the case of gasoline; fire, with heavy oil, etc.

Inspectors shall determine a man's ability to fulfill these requirements by written or oral examination, backed by evidence as to character and experience. No knowledge of steam plants, or previous experience with them shall be required of operators of small motor vessels.

4. These rules, as outlined, shall apply to the various classes of vessels generally as follows:

(a) Passenger vessels -

Inspection - All to be inspected.

Deck Officer - Above 200 tons - Licensed officers.
Below 200 tons - Certificate "A".

Engineer Officers - Above 200 tons - licensed officers.
Below 200 tons - Certificate "M"

(b) Cargo Vessels - Except vessels carrying dangerous cargoes provided for under Public Act 343.

Inspection - Up to 15 tons, no inspection required.
15 tons and above, to be inspected.

Deck Officers -Up to 15 tons - certificate "B".
15 to 200 tons - certificate "A".
Above 200 tons - Licensed officer.

Engineer Officers - Up to 15 tons-no examination required.
15 to 200 tons - certificate "M".
Above 200 tons - Licensed officer.

(c) Towboats - Same as Cargo Vessels.

(d) Fishing, Seafood and Allied Vessels - Same as Cargo Vessels, except that special consideration may be given to vessels of over _____ tons.

5. Motor vessels actually operated by owner, yachts, etc.
No inspection shall be required other than that now in force as to life preservers, fire extinguishers, running lights, etc.

Attention is directed to the fact that many of these relative small vessels are over 20 tons, and many are of very high speed - 30 knots and more. In the hands of unskilled or careless operators, they are a constant menace to other craft. It is suggested that opportunity to qualify for Certificates A.B. and M be offered to the operators of these small vessels if they desire them and are found, by examination, to be duly qualified.

16455

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No. 2

61st Congress, 2d Session. | HOUSE OF REPRESENTATIVES. | Report No. 1430.

EQUIPMENT OF CERTAIN MOTOR BOATS, ETC.

JUNE 2, 1910.—Ordered to be printed.

Mr. GREENE, from the committee of conference, submitted the following

CONFERENCE REPORT.

[To accompany S. 7359.]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 7359) to amend laws for preventing collisions of vessels and to regulate equipment of certain motor boats on the navigable waters of the United States, having met, after full and free conference have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with amendments as follows:

Section 1, in the fourth line thereof, after the word "steam," strike out the words: "and sail vessels using auxiliary power."

In the last line of section 1, after the word "steam," strike out the words: "This act shall not apply to nonnavigable waters."

Section 3, after the word "long," at the end thereof, strike out the period and insert a colon and the following:

Provided, That motor boats, as defined in this act, when propelled by sail and machinery or under sail alone, shall carry the colored lights, suitably screened, but not the white lights prescribed by this section.

Section 5, in the first line thereof, strike out the words: "of class two or three"

In the fourth line of section 5, after the word "carry," insert the word *either*; after the word "life-preservers," insert the word *or*; after the word "belts" insert the word *or*; and in the fifth line of said section 5, after the word "buoys," insert the words: *or other device, to be prescribed by the Secretary of Commerce and Labor.*

Section 9, after the word "repealed," at the end thereof, strike out the period and insert a colon and the following:

Provided, That nothing in this act shall be deemed to alter or amend acts of Congress embodying or revising international rules for preventing collisions at sea.

WM. S. GREENE,
W. E. HUMPHREY,
J. W. ALEXANDER,
Managers on the part of the House.

J. H. GALLINGER,
GEO. C. PERKINS,
JAMES P. CLARKE,
Managers on the part of the Senate.

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE, TO ACCOMPANY CONFERENCE REPORT ON BILL S. 7359.

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 7359) to amend laws for preventing collisions of vessels and to regulate equipment of certain motor boats on the navigable waters of the United States, submit the following written statement explaining the effect of the action agreed on:

It was agreed to recommend that the Senate recede from its disagreement to the amendment of the House and agree to the same, amended as follows:

Section 1, in the fourth line thereof, after the word "steam" strike out the words: "and sail vessels using auxiliary power." Also, in the last line of section 1, after the word "steam" strike out the words: "This act shall not apply to nonnavigable waters."

Section 3, after the word "long" at the end thereof, strike out the period and insert a colon and the following: "*Provided*, That motor boats as defined in this act, when propelled by sail and machinery or under sail alone, shall carry the colored lights suitably screened but not the white lights prescribed by this section."

Section 5, in the first line thereof, strike out the words: "of class two or three."

In the fourth line of section 5, after the word "carry," insert the word "either;" after the word "life-preservers" insert the word "or;" after the word "belts" insert the word "or;" and in the fifth line of said section 5, after the word "buoys," insert the words: "or other device, to be prescribed by the Secretary of Commerce and Labor."

Section 9, after the word "repealed" at the end thereof, strike out the period and insert a colon and the following: "*Provided*, That nothing in this act shall be deemed to alter or amend acts of Congress embodying or revising international rules for preventing collisions at sea."

WM. S. GREENE,
W. E. HUMPHREY,
J. W. ALEXANDER,
Managers on the part of the House.

No. 2

61st Congress, 2d Session. } HOUSE OF REPRESENTATIVES. { Report No. 1162.

EQUIPMENT OF CERTAIN MOTOR BOATS.

April 29, 1910.—Referred to the House Calendar and ordered to be printed.

Mr. Humphrey, of Washington, from the Committee on the Merchant Marine and Fisheries, submitted the following

REPORT.

[To accompany S. 7359.]

The Committee on the Merchant Marine and Fisheries, to whom was referred the bill (S. 7359) to amend laws for preventing collisions of vessels and to regulate equipment of certain motor boats on the navigable waters of the United States, have considered the bill, and recommend that the bill be amended by striking out all after the enacting clause and substituting therefor the following:

That the words "motor boat" where used in this act shall include every vessel propelled by machinery and not more than sixty-five feet in length, except tugboats and towboats propelled by steam. The length shall be measured from end to end over the deck, excluding sheer: *Provided*, That the engine, boiler, or other operating machinery shall be subject to inspection by the local inspectors of steam vessels and to their approval of the design thereof on all said motor boats which are more than forty feet in length and which are propelled by machinery driven by steam.

Sec. 2. That motor boats subject to the provisions of this act shall be divided into classes as follows:

Class one. Less than twenty-six feet in length.

Class two. Twenty-six feet or over and less than forty feet in length.

Class three. Forty feet or over and not more than sixty-five feet in length.

Sec. 3. Every motor boat in all weathers from sunset to sunrise shall carry the following lights and during such time no other lights which may be mistaken for those prescribed shall be exhibited.

(a) Every motor boat of class one shall carry the following lights:

First. A white light aft to show all around the horizon.

Second. A combined lantern in the forepart of the vessel and lower than the white light aft, showing green to starboard and red to port, so fixed as to throw the light from right ahead to two points abaft the beam on their respective sides.

(b) Every motor boat of classes two and three shall carry the following lights:

First. A bright white light in the forepart of the vessel as near the stem as practicable, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side. The glass or lens shall be of not less than the following dimensions:

Class two. Nineteen square inches.

Class three. Thirty-one square inches.

Second. A white light aft to show all around the horizon.

Third. On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side. On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side. The glasses or lenses in the said side lights shall be of not less than the following dimensions on motor boats of—

Class two. Sixteen square inches.

Class three. Twenty-five square inches.

On and after July first, nineteen hundred and eleven, all glasses or lenses prescribed by paragraph (b) shall be fresnel or fluted. The said lights shall be fitted with inboard screens of sufficient height and so set as to prevent these lights from being seen across the bow, and shall be of not less than the following dimensions on motor boats of—

Class two. Eighteen inches long.

Class three. Twenty-four inches long.

SEC. 4. (a) Every motor boat under the provisions of this act shall be provided with a whistle or other sound-producing mechanical appliance capable of producing a blast of two seconds or more in duration, and in the case of such boats so provided a blast of at least two seconds shall be deemed a prolonged blast within the meaning of the law.

(b) Every motor boat of class two or three shall carry an efficient fog horn.

(c) Every motor boat of class two or three shall be provided with an efficient bell, which shall be not less than eight inches across the mouth, on board of vessels of class three.

SEC. 5. That every motor boat subject to any of the provisions of this act, and also all vessels propelled by machinery other than by steam, more than sixty-five feet in length, shall carry life-preservers, life belts, buoyant cushions, or ring buoys sufficient to sustain afloat every person on board, and so placed as to be readily accessible. All motor boats carrying passengers for hire shall carry one life-preserver of the sort prescribed by the regulations of the board of supervising inspectors for every passenger carried, and no such boat while so carrying passengers for hire shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors. No examination shall be required as the condition of obtaining such a license, and any such license shall be revoked or suspended by the local board of inspectors for misconduct, gross negligence, recklessness in navigation, intemperance, or violation of law on the part of the holder, and if revoked the person holding such license shall be incapable of obtaining another such license for one year from the date of revocation.

SEC. 6. That every motor boat and also every vessel propelled by machinery other than by steam, more than sixty-five feet in length, shall carry ready for immediate use the means of promptly and effectually extinguishing burning gasoline.

SEC. 7. That a fine not exceeding one hundred dollars may be imposed for any violation of this act. The motor boat shall be liable for the said penalty and may be seized and proceeded against, by way of libel, in the district court of the United States for any district within which such vessel may be found.

SEC. 8. That the Secretary of Commerce and Labor shall make such regulations as may be necessary to secure the proper execution of this act by collectors of customs and other officers of the Government. And the Secretary of the Department of Commerce and Labor may, upon application therefor, remit or mitigate any fine, penalty, or forfeiture relating to motor boats, except for failure to observe the provisions of section 6 of this act.

SEC. 9. All laws and parts of laws only in so far as they are in conflict herewith are hereby repealed.

SEC. 10. That this act shall take effect on and after thirty days after its approval.

The bill as amended in its essentials is the measure which passed the Senate on April 26, 1910, in behalf of which the Department of Commerce and Labor submitted the following report:

DEPARTMENT OF COMMERCE AND LABOR,
OFFICE OF THE SECRETARY,
Washington, April 13, 1910.

SIR: The department has received your letter of the 24th ultimo, inclosing S. 7359, "A bill to amend laws for preventing collision of vessels and to regulate equipment of certain motor boats on the navigable waters of the United States." Complying

with your request that I furnish your committee with such suggestions as I may deem proper touching the merits of the bill and the propriety of its passage, I have to state:

The department favors the passage of the bill at the present session of Congress. It is in general accord with the following recommendation of the annual report of the Secretary of Commerce and Labor for 1909:

"Within ten years conditions of navigation have been appreciably changed by the rapid growth of the motor-boat industry. The 'rules of the road,' enacted before these boats came into general use, require in some cases useless or impossible equipment, and other laws fail to provide adequately for equipment. The laws should be adjusted to the conditions."

The international rules for preventing collisions at sea, framed in 1890 and carried into effect in 1897, contain this definition: "The words 'steam vessel' shall include any vessel propelled by machinery." The act of 1895, to prevent collisions on the Great Lakes, the St. Lawrence River and connecting waters, and the inland rules of 1897 contain the same definition. That definition has also been carried into section 4233 of the Revised Statutes governing the navigation of vessels on the Mississippi and other rivers flowing into the Gulf of Mexico, with their tributaries. The effect of this definition is to prescribe under heavy penalties the same lights and sound-signaling apparatus for small motor boats as for steamers.

At the time these rules were approved by the International Maritime Conference at Washington, and subsequently by acts of Congress, motor boats were practically unknown, though vessels were in rare cases propelled by electricity. Within the past ten years the construction and use of motor boats has enormously increased, and, while exact figures are not available, probably there are fully 100,000 such boats employed on waters within federal jurisdiction. The laws to prevent collisions of vessels, popularly known as the "rules of the road," are the most important acts of Congress for the safety of life on the water, and have the most general application. Respect for all law relating to vessels is impaired when these rules are ignored.

The Department of Commerce and Labor is reluctant for another reason to undertake to enforce laws which prescribe physical impossibilities, and in this view responsible motor-boat owners and manufacturers throughout the country concur. Tens of thousands of motor boats of considerable speed are only 15 to 18 or 20-odd feet long. The laws require them to carry a white light from 15 to 20 feet above the hull. A pole or staff of that height on so short a boat is a factor of danger, not safety, and of course ought not to be prescribed.

The green and red side lights by law must have screens 3 feet long, and to secure the statutory range of visibility, 2 miles, they must be carried at a height of 3 feet above the hull. On thousands of small motor boats compliance with this law, if possible, would assign all the forward part of the boat to the side lights.

The first section of the bill defines motor boats and establishes the simplest possible rule to ascertain length, according to which by standard sizes the second section divides them into classes.

The third section of the bill establishes a practical uniform system of lights for motor vessels which follows the principles governing such lights according to the rules of the road. The changes to be effected are shown in a synoptical table attached to this report.

A whistle is necessary on a vessel propelled by machinery to indicate to approaching vessels in clear weather her course, as well as to sound in fog. The law prescribes that the whistle under certain conditions must sound a prolonged blast of from four to six seconds. Where steam is available this prolonged blast can readily be produced. On motor boats so long a blast can be produced only by an expensive apparatus with an air chamber 5 or 6 feet long. The bill retains the whistle, but reduces the prolonged blast to two seconds.

A fog horn is the distinctive signal of the sail vessel, and is carried on steamers under the international rules, for use only if the steam whistle breaks down. It is not prescribed on our Great Lakes or the Mississippi, and under this bill will not be required on smaller motor boats on the seaboard, though it can, of course, be carried.

The bell is used only when a vessel is at anchor in a fog. Thousands of small motor boats carry no anchors and are never in a fog. The department's experience shows that these bells are often stolen. In relieving these small boats of the necessity for carrying a bell (its use remains optional) the department agrees to a diminution from the rules, but does not consider that danger will be incurred thereby. The bell and the fog horn will be required on the larger classes of motor boats as at present.

The use of gasoline as fuel on motor boats introduces a special element of danger. While prudent manufacturers and owners provide against this danger, the department believes Congress should take cognizance of it, and in this belief it has the support of the owners and builders of motor boats. There is now no law requiring [illegible]

extinguishing apparatus on any kind of motor boats, though some of them carry 100 passengers or more. Life-preservers are prescribed only for motor boats of less than 15 tons carrying passengers. Section 5 of the bill requires life-preservers, life-belts, buoyant cushions, or ring buoys on all motor boats, and section 6 prescribes that all motor boats over 25 feet long must carry, ready for immediate use, the means of promply and effectually extinguishing burning gasoline. Motor boats are of so many types and sizes, and employed for so many purposes, that the department considers that better results will be reached by the general prescriptions of sections 5 and 6 than by an attempt to particularize the kinds of apparatus required or even to require that such apparatus must first be inspected and stamped by government officers.

The department recommends four slight changes in the bill:

1. In the title the word "collision" should read "collisions," to conform to other laws.

2. At page 1, lines 10 and 11, the word "twenty-five" should be changed to "twenty-six." While 25 feet is a standard length for many small motor boats, in numerous instances they are reported to overrun this length by a few inches. Any difficulty on this score will be obviated by making the limit 26 feet, as now proposed.

3. At page 1, line 13, the word "less" should be changed to "not more," thus giving boats of just 65 feet in length—a standard length—a place in class 3.

4. At page 5, lines 17, 18, and 19, strike out the words "This section shall not be construed to amend or repeal any existing law requiring life-preservers," and substitute therefor the following: "So much of section 4426 of the Revised Statutes as amended as provides for life-preservers on vessels fifteen gross tons or less propelled in whole or in part by gas, gasoline, petroleum, naphtha, fluid, or electricity, and carrying passengers for hire is hereby repealed." By this amendment motor boats under 15 tons, carrying passengers, will be taken out of the present special rule and brought under the general rule of section 5 by which life belts, buoyant cushions, and ring buoys may be carried. A uniform rule will thus be established, which the department deems desirable.

The bill does not change existing laws except as indicated in its text. It does not change the present laws for licensed operators or officers of motor boats, the laws requiring custom-house documents in certain cases, the painting of a vessel's name, etc.

The department is aware that in the matter of the inspection of hulls and machinery, license of officers, and other particulars the laws make considerable distinction between steamboats and motor boats. It has been urged on the one hand to recommend that in this bill motor boats be subjected to many of the statutory requirements now prescribed for steam vessels. On the other hand it has been urged to recommend that steam vessels be exempted in this bill from many requirements of law not now applicable to motor boats. While much may be urged by special interests for or against either of these propositions the department is opposed to the use of this bill as a vehicle to carry such propositions into law. Such propositions may well be considered separately on their merits by Congress.

The measure as it stands is a necessity to the orderly obedience of law in which probably a million people all through the United States are concerned. The department has had extensive correspondence and conferences with motor-boat owners and manufacturers, and understands that while some would desire additional provisions in the bill, practically all are in favor of the propositions it does contain.

Respectfully,

BENJ. S. CABLE, *Acting Secretary.*

HON. WILLIAM P. FRYE,
Chairman Committee on Commerce,
United States Senate, Washington, D. C.

DEPARTMENT OF COMMERCE AND LABOR,
OFFICE OF THE SECRETARY,
Washington, April 16, 1910.

SIR: The department's letter of the 13th instant in favor of S. 7209, "A bill to amend laws for preventing collision of vessels and to regulate equipment of certain motor boats on the navigable waters of the United States," contained the following paragraph:

"At page 1, line 13, the word 'less' should be changed to 'not more,' thus giving boats of just 65 feet in length, a standard length, a place in class three." To conform to this change the following changes should also have been recommended:

Page 1, line 6, change the word "less" to "not more."

Page 5, line 11, insert the words "more than" before the words "sixty-five feet" and strike out the words "or more."

Page 5, line 23, insert the words "more than" before the words "sixty-five feet" and strike out the words "or more."

A copy of the bill with the changes recommended by the department is attached hereto.

Respectfully,

BENJ. S. CABLE,
Acting Secretary.

Hon. WILLIAM P. FRYE,
Chairman Committee on Commerce,
United States Senate, Washington, D. C.

SYNOPTICAL TABLE OF CHANGES.

Changes in lights and sound-signaling appliances prescribed by the several "Rules of the Road."

[Motor boats over 65 feet are to carry as at present the lights and sound-signaling appliances prescribed for steam vessels.]

LIGHTS.

	Proposed bill (S. 7359; H. R. 23373).	Seaboard law (act of June 7, 1897).	Great Lakes law (act of Feb. 8, 1895).	Gulf rivers law (sec. 4233, R. S.).
Boats under 26 feet long.				
White lights	One aft, showing around horizon.	Range of 2 lights; forward showing 5 miles; light aft 15 feet higher than forward and showing around horizon.	Forward showing 5 miles and 20 feet above hull.	Range of 2 lights; light aft 15 feet higher than light forward and showing around horizon.
Side light	Combined green and red lantern forward.	Starboard green and port red, each showing 2 miles, with 3-foot screens. (Vessels under 10 tons in bad weather may carry portable green and red lanterns, to be displayed on approach.)	Same as seaboard.	Same as seaboard.
Boats from 26 to 65 feet long.				
White lights	One forward at stem and one aft showing around horizon. Minimum lenses defined.	Same as white lights above.	Same as white lights above.	Same as white lights above.
Side lights	Starboard green and port red, minimum lenses defined; screens 18 to 24 inches.	Same as side lights above.	Same as side lights above.	Same as side lights above.

Changes in lights and sound-signaling appliances prescribed by the several "Rules of the Road"—Continued.

SOUND-SIGNAL APPARATUS.

	Proposed bill (S. 7359; H. R. 22073).	Seaboard law (act of June 7, 1897).	Great Lakes law (act of Feb. 8, 1895).	Gulf rivers law (sec. 4233, R. S.)
Boats under 26 feet long.				
Whistle	Efficient whistle sounding blast of 2 seconds.	Efficient whistle sounding blast of 4 to 6 seconds, sounded by steam or substitute.	Efficient whistle audible 2 miles.	Whistle 8 feet above deck.
Fog horn	None	Efficient fog horn.	None	None.
Bell	do	Efficient bell	Efficient bell	Bell.
Boats from 26 to 65 feet long.				
Whistle	As above	As above	As above	As above.
Fog horn	Efficient fog horn.	Efficient fog horn.	None	Do.
Bell	Efficient bell (8 inches in boat over 40 feet).	Same as above.	Same as above.	Same as above.

Changes in specific life-saving equipment.

	Proposed bill (S. 7359; H. R. 22073).	Existing law (sec. 4426 R. S.).
Life preservers	All motor boats, whatever their length, shall carry life-preservers, life belts, buoyant cushions, or ring buoys sufficient to sustain afloat every person on board and so placed as to be readily accessible.	All vessels of 15 gross tons or less, propelled in whole or in part by gas, gasoline, petroleum, naphtha, fluid, or electricity, and carrying passengers for hire, shall carry one life-preserver, of the sort prescribed by the regulations of the Board of Supervising Inspectors, for every passenger carried.
Fire extinguishers	All motor boats over 26 feet shall carry, ready for immediate use, the means of promptly and effectually extinguishing burning gasoline.	Nothing.

The Senate bill provides that motor boats of not more than 40 feet in length used exclusively for pleasure, propelled by steam, shall be subject to the same regulations as other motor boats.

The bill as amended provides, further, that steam vessels not more than 65 feet in length and not used for carrying passengers for hire nor as tugboats nor towboats shall not be required to carry licensed officers.

The amended bill also provides the uniform penalty of $100 for violations of the act instead of the various penalties provided in various sections of the Senate bill.

The bill recommended by your committee further prescribes that on all motor boats carrying passengers for hire life preservers must be of the sort prescribed by the Board of Supervising Inspectors. In other essentials the bills are in accord, and in view of the coming opening of the season of navigation the committee unanimously recommends the prompt passage of the bill.

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No. 2

74TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT No. 1321

INSPECTION OF MOTOR VESSELS

JUNE 25, 1935.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. BLAND, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[To accompany S. 2001]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (S. 2001) to amend section 4426 of the Revised Statutes of the United States as amended by the act of Congress approved May 16, 1906, having had the same under consideration, report it back to the House with amendments and, as so amended, recommend that the bill do pass.

The amendments proposed by the Committee are as follows:

Page 2, line 10, insert after the word "all" where it appears the second time in said line, the word "sea-going".

Page 2, line 11, change the word "fifteen" to "twenty".

Page 2, line 15, after the word "thereto" change the period to a comma and insert "but this paragraph shall not apply to vessels engaged in fishing or oystering as a regular business".

The first amendment inserts the word "sea-going" to make this law applicable to sea-going vessels and inoperative as to small craft on inland waters, concerning which the committee desires additional information, and will study later, but the legislation on larger craft is so necessary that delay is not desired. The evidence so far shows that to make this law applicable to small boats on inland waters may result in great hardships.

The second amendment changes the tonnage because the information before the committee shows that this may prove unduly burdensome on vessels under 20 tons.

The third amendment is made to exclude vessels engaged in fishing and oystering as a regular business. The proposed law was not intended to apply to this class, but only to vessels carrying freight or passengers for hire. Those engaged in fishing and oystering as a regular business expressed fear that they would be included though that

Note: Correct memorandum of the United States, Amicus Curiae in Case No. 2, October Term 1937, page 2, footnote 1, to show the 772 vessels are over 100 tons each, to accord with this report.

was not intended, and to make the exclusion clear, the amendment was adopted.

A bill similar to S. 2001 was recommended to the House committee and introduced. This bill is known as "H. R. 6037."

Hearings were held on the House bill and testimony disclosed discrimination in favor of Diesel-operated towing vessels which are subject to inspection laws to a limited extent while competitive steam vessels of the same size are subject to full inspection and regulation.

The primary object, however, of the legislation is to reach many larger vessels that should have full inspection. The situation is graphically portrayed by Mr. Tyrer, Assistant Director of the Bureau of Navigation and Steamboat Inspection, in his testimony before the committee, when he said:

> We have at the present time vessels that are operated by internal-combustion engines, of tonnages exceeding 100, there are 772 vessels of 819,935 gross tons that would come under the provision of this law.
>
> For instance, we have in the class from 5,000 to 7,500 tons 29 vessels, with a total tonnage of 179,556; and over 7,500 tons we have 33 vessels, with a total tonnage of 300,292.
>
> Those large vessels at the present time are subject to only a very limited inspection—that is, the inspection of the hulls and boilers, and are required under the law to carry a licensed engineer and a licensed pilot. The provisions of section 4472 that provides for protection against fire do not apply to our 7,500-ton vessels that are in the trans-Atlantic trade. They are not required under the law to carry a single lifeboat. There are many other provisions of the steamboat inspection laws that are of the utmost importance to safety of life that do not apply to these large transoceanic vessels. As a matter of fact, we are inspecting those vessels at the present time, but it is only because the owners of the ships accept such inspection. It is not a matter of law.

Mr. Tyrer introduced a statement of vessels not subject to such inspection and which should be brought under it. This statement is as follows:

Tonnage	Number	Total tonnage	Tonnage	Number	Total tonnage
100 to 500	556	110,652	5,000 to 7,500	29	179,566
500 to 1,000	67	45,324	Over 7,500	33	300,292
1,000 to 2,500	71	117,811			
2,500 to 5,000	16	65,290	Total	772	818,935

The committee feels that this situation should be corrected and accordingly report favorably this bill.

The bill has the favorable recommendation of the Department of Commerce as appears from the following report:

DEPARTMENT OF COMMERCE, REPORT OF THE BUREAU OF NAVIGATION AND STEAMBOAT INSPECTION

H. R. 6037, a bill to amend section 4426 of the Revised Statutes of the United States, as amended by the act of Congress approved May 16, 1906.

This proposed bill is to amend section 4426 of the Revised Statutes as amended by the act of Congress approved May 16, 1906.

When title LII covering the steamboat-inspection laws was passed, internal-combustion engines were practically unknown, with the result that a very large portion of the existing law applies to steam vessels and under the opinions of the law officers of this Department, does not apply to vessels operated by machinery other than steam. For example, it is very doubtful whether under existing law, we can require lifeboats on motor vessels regardless of their size or trade.

The provisions of section 4472 Revised Statutes applying to safeguards against the carrying of inflammable or dangerous articles, applies only to steam vessels. There are many other provisions in the steamboat laws that are equally inapplicable to motor-driven boats.

We have at present 215 internal-combustion engine vessels of 703,828 gross tons over which the Steamboat Inspection Service has limited jurisdiction. It is the custom to inspect those vessels and require proper equipment, but, in some respects, this is by courtesy and not by authority of law.

The enactment of this bill would involve additional expenditures by the Bureau of $50,000 annually, including $46,500 for 15 additional inspectors and $3,500 for their travel.

It will be noted in the Ramseyer rule, which follows, that the provisions requiring motor boats of 15 gross tons or less, transporting passengers for hire, to carry a life preserver for each passenger carried and to be navigated only by a person duly licensed by the local board of steamboat inspectors, are repealed by this bill.

This repeal is made because a later act of Congress known as the "Motor Boat Law of June 9, 1910", not only takes care of the situation covered by the second paragraph of Revised Statutes 4426, but extends the supervision of the Steamboat Inspection Service over the safety requirements for motor vessels by requiring all motor boats carrying passengers for hire to carry a life preserver for each passenger on board and to be navigated by a person duly licensed by the local board of steamboat inspectors.

CHANGES IN EXISTING LAW

In compliance with paragraph 2a of rule XIII of the Rules of the House of Representatives, section 4426 of the Revised Statutes of the United States, as amended by the act of Congress approved May 16, 1906, is herewith set out, the changes proposed by this bill being shown as follows (existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italics; and existing law in which no change is proposed is shown in roman):

SEC. 4426. The hull and boilers of every ferryboat, canal boat, yacht, or other small craft of like character propelled by steam, shall be inspected under the provisions of this title. Such other provisions of law for the better security of life as may be applicable to such vessel shall, by the regulations of the board of supervising inspectors, also be required to be complied with before a certificate of inspection shall be granted, and no such vessel shall be navigated without a licensed engineer and a licensed pilot: *Provided, however*, That in open steam launches of ten gross tons and under, one person, if duly qualified, may serve in the double capacity of pilot and engineer. [All vessels of above fifteen gross tons carrying freight or passengers for hire, but not engaged in fishing as a regular business, propelled by gas, fluid, naphtha, or electric motors, shall be, and are hereby, made subject to all the provisions of section 4426 of the Revised Statutes of the United States relating to the inspection of hulls and boilers and requiring engineers and pilots, and for any violation of the provisions of this title applicable to such vessels, or of rules or regulations lawfully established thereunder, and to the extent to which such provisions of law and regulations are so applicable, the said vessels, their masters, officers, and owners shall be subject to the provisions of sections 4496, 4497, 4498, 4499, and 4500, relating to the imposition and enforcement of penalties and the enforcement of law.

All vessels of fifteen gross tons or less propelled in whole or in part by gas, gasoline, petroleum, naphtha, fluid, or electricity, and carrying passengers for hire, shall carry one life preserver, of the sort prescribed by the regulations of the board of supervising inspectors, for every passenger carried, and no such boat while so carrying passengers shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors. No examination shall be required as a condition of the obtaining of such a license, and any such license shall be revoked or suspended by the local board of inspectors for mis-

conduct, gross negligence, recklessness in navigation, intemperance, or violation of law on the part of the holder, and, if revoked, the person holding such license shall be incapable of obtaining another such license for one year from the date of revocation.]

That from and after three months after the date of the approval of this Act, all towing vessels, and all sea-going vessels of above twenty gross tons propelled by machinery, the propulsion power of which is other than by steam, carrying freight or passengers for hire, shall be subject to all of the provisions of the laws relating to steam vessels, insofar as they may be applicable thereto, but this paragraph shall not apply to vessels engaged in fishing or oystering as a regular business.

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No. 2

74TH CONGRESS, 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 2505

INSPECTION OF VESSELS PROPELLED BY INTERNAL-COMBUSTION ENGINES

APRIL 28, 1936.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. BLAND, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[To accompany H. R. 12419]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (H. R. 12419) to apply laws covering steam vessels to seagoing vessels of 300 gross tons and over propelled by internal-combustion engines, having had the same under consideration, report it back to the House without amendment and recommend that the bill do pass.

The purpose of the bill is to make existing laws covering the inspections of steam vessels applicable to seagoing vessels of 300 gross tons and over propelled by internal-combusion engines to such extent and upon such conditions as may be required by the regulations of the Board of Supervising Inspectors of Steam Vessels, with the approval of the Secretary of Commerce.

The provisos except fishing vessels and vessels in the Hawaiian waters. Vessels engaged in the fisheries have been exempted since the beginning of their use. Many of these vessels are operated by their owners and members of their families and, as a rule, they are operated by men trained to the sea and well-informed as to what equipment they should carry for their own safety.

The exemption as to Hawaiian waters applies to the peculiar conditions existing there.

At hearings held by your committee on safety legislation, it was pointed out by Mr. Tyrer, Assistant Director of the Bureau of Navigation and Steamboat Inspection, that at the present time we have 29 vessels in the class from 5,000 to 7,500 tons, with a tonnage

of 179,556 tons and 33 vessels over 7,500 tons with a total tonnage of 300,292.

Mr. Tyrer said:

> Those large vessels at the present time are subject to only a very limited inspection—that is, the inspection of the hulls and boilers—and are required under the law to carry a licensed engineer and a licensed pilot. The provisions of section 4472 that provides for protection against fire do not apply to vessels over 7,500 tons that are in the trans-Atlantic trade. They are not required under the law to carry a single lifeboat. There are many other provisions of the steamboat inspection laws that are of the utmost importance to safety of life that do not apply to these large transoceanic vessels. As a matter of fact, we are inspecting these vessels at the present time, but it is only because the owners of the ships accept such inspection. It is not a matter of law.

The situation which has been described is due to the fact that when the steamboat-inspection laws were passed, internal-combustion-engine laws were unknown, with the result that many of the existing laws apply to steam vessels and under the opinion of the law officers of the department, do not apply to vessels operated by machinery other than by steam. It was said that it was very doubtful whether under existing law lifeboats could be required on these motor vessels.

Under section 4426, Revised Statutes, all motor-propelled vessels of above 15 gross tons, carrying freight and passengers; for hire, but not engaged in fishing as a regular business, are made subject to all the provisions of that section relating to the inspection of hulls and boilers and requiring engineers and pilots. Under the same section, all vessels of 15 gross tons or less, propelled in whole or in part by gas, gasoline, petroleum, naphtha, fluid, or electricity, and carrying passengers for hire, are required to carry one life preserver of the sort prescribed by the regulations of the Board of Supervising Inspectors for every passenger carried, and no such boat while so carrying passengers shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors. These licenses may be revoked or suspended for misconduct, gross negligence, recklessness in navigation, intemperance, or violation of law on the part of the holder, and, if revoked, the person holding such license shall be incapable of obtaining another such license for 1 year from the date of revocation.

The motorboat law, approved June 9, 1910, applies to every vessel propelled by machinery and not more than 65 feet in length, except tugboats and towboats propelled by steam.

Under section 5 of the motorboat law all vessels propelled by machinery other than by steam, more than 65 feet in length, shall carry either life preservers, or life belts, or buoyant cushions, or ring buoys, or other device, to be prescribed by the Secretary of Commerce, sufficient to sustain afloat every person on board and so placed as to be readily accessible.

The Bureau of Navigation and Steamboat Inspection is working on plans for conferences during this year at which there will be considered a thorough revision of all laws pertaining to motorboats, vessels under 300 tons propelled by internal-combustion engines, and the smaller steam vessels. These plans contemplate licensed certificated officers, engineers, and will take under consideration all boats on inland waters

and the high seas. It is expected that as a result of their studies, additional legislation will be submitted at the next session of Congress.

The proposed legislation does not repeal any existing laws but supplements them in cases represented by the Bureau of Navigation and Steamboat Inspection as important to be taken care of at this time.

Seagoing vessels are defined with reference to section 2 of chapter 102, of act of 1895, as amended, under which the Secretary of Commerce may from time to time designate and define by suitable bearings or ranges with lighthouses, light vessels, buoys, or coastal objects, the lines dividing the high seas from rivers, harbors, and inland waters.

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No. 2

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Calendar No. 2323

74TH CONGRESS, 2d Session | SENATE | REPORT No. 2212

INSPECTION OF VESSELS PROPELLED BY INTERNAL-COMBUSTION ENGINES

JUNE 1 (calendar day, JUNE 3), 1936.—Ordered to be printed

Mr. FLETCHER, from the Committee on Commerce, submitted the following

REPORT

[To accompany H. R. 12419]

The Committee on Commerce, to whom was referred the bill (H. R. 12419) to apply laws covering steam vessels to seagoing vessels of 300 gross tons and over propelled by internal-combustion engines, having considered the same, report thereon with an amendment and, as so amended, recommend that the bill do pass, the amendment referred to therein having been incorporated in the bill as reported.

The House report follows:

For House Report No. 2505 see photostatic copy thereof submitted herewith

SUPREME COURT OF THE UNITED STATES.

No. 2.—October Term, 1937.

E. Pat Kelly, as Director of the Department of Labor and Industries of the State of Washington, et al., Petitioners,
vs.
State of Washington on the relation of Foss Company, Inc.

On Writ of Certiorari to the Supreme Court of the State of Washington.

[November 8, 1937.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Respondents, owners of motor-driven tugs, sought a writ of prohibition to prevent the enforcement of provisions of Chapter 200 of the Washington Laws of 1907 (Rem. Rev. Stat., secs 9843 *et seq.*) relating to the inspection and regulation of vessels. The Supreme Court of the State directed judgment for respondents, holding the statute invalid "if applied to the navigable waters over which the Federal Government has control". 186 Wash. 589, 596. We granted certiorari. 299 U. S. 539. After hearing, we ordered reargument and requested the Attorney General of the United States to present the views of the Government upon the question whether the state act or the action of the officers of the State thereunder conflicts with the authority of the United States or with the action of its officers under the acts of Congress. The case has been reargued accordingly and the views of the Government have been presented both orally and upon brief in support of the decision of the state court.

The material facts, as set forth in the opinion of the state court, are that respondents own and operate one hundred and thirty-nine motor-driven tugs of which one hundred and eleven are less than sixty-five feet in length. Some of these tugs are registered and the remainder are enrolled and licensed under federal laws. For the most part these tugs are employed in intrastate commerce, but some tow to and from British Columbia ports or across the

Columbia River or from other ports in Washington to ports in Oregon. Practically all these tugs are capable of engaging in interstate or foreign commerce and will do so if and when opportunity offers. Some of the larger tugs have towed and will tow to California ports. The main business, however, of most of the tugs is confined to moving vessels engaged in interstate and foreign commerce and other work in and about the harbors where they are stationed. 186 Wash. p. 590.

Respondents' complaint challenged the validity of a large number of requirements of the state act which it was alleged the state authorities sought to enforce (186 Wash. p. 591), but these authorities by their answer and in the argument at bar disclaim an intention to enforce any of the state regulations which conflict with those established under the laws of the United States.

First.—The first question is whether the state legislation as applied to respondents' motor-driven tugs is in all respects in conflict with express provisions of the federal laws and regulations. Wherever such conflict exists, the state legislation must fall. *Gibbons* v. *Ogden,* 9 Wheat. 1, 210.

Chapter 200 of the Washington Laws of 1907 is described by the state court as "a comprehensive and complete code for the inspection and regulation of every vessel operated by machinery which is not subject to inspection under the laws of the United States". Rem. Rev. Stat., sec. 9844; 186 Wash. p. 590. It cannot be doubted that the power of Congress over interstate and foreign commerce embraces the authority to make regulations for respondents' tugs. *Foster* v. *Davenport,* 22 How. 244; *Moran* v. *New Orleans,* 112 U. S. 69; *Harman* v. *Chicago,* 147 U. S. 396. Has Congress exercised that authority and, if so, to what extent?

The federal acts and regulations with respect to vessels on the navigable waters of the United States are elaborate. They were well described in the argument of the Assistant Solicitor General as a maze of regulation. Provisions with respect to steam vessels are extremely detailed. 46 U. S. C., chap. 14, secs. 361 *et seq.* Provisions as to motor-driven vessels are far less comprehensive and establish only a limited regulation. By Section 4426 of the Revised Statutes, as amended by the Act of March 3, 1905, c. 1457, 33 Stat. 1029, 1030, and by the Act of May 16, 1906, c. 2460, 34 Stat. 193, 194, it was provided that all vessels "above fifteen gross

tons carrying freight or passengers for hire, but not engaged in fishing as a regular business, propelled by gas, fluid, naptha, or electric motors", should be subject to the provisions of the statute relating to the inspection of hulls and boilers and requiring engineers and pilots. These vessels were also required to carry life preservers for passengers and, while carrying passengers, to be in charge of a person duly licensed by the federal local board. 46 U. S. C. 404. It does not appear that respondents' motor-driven tugs are within the class of vessels which carry freight or passengers for hire.

In 1910, Congress enacted the Motor Boat Act. 36 Stat. 462. While this statute is applicable to respondents' tugs, so far as it goes, its scope is restricted. Section 1 defines the word "motor boat" as including "every vessel propelled by machinery and not more than sixty-five feet in length except tugboats and towboats propelled by steam". There follows in that section a proviso that the engine, boiler or other operating machinery shall be subject to inspection by the local inspectors of steam vessels, and to the approval of the design thereof, where the vessels "are more than forty feet in length and are propelled by machinery driven by steam". Section 2 divides the motor boats which are subject to the Act into three classes; (1) those less than twenty-six feet in length; (2) those twenty-six feet or over and less than forty feet in length; (3) those forty feet or over and not more than sixty-five feet in length. Section 3 then provides for the carrying of lights by motor boats of the respective classes. Section 4 relates to whistles, fog horns and bells. Sections 5 and 6 provide that motor boats subject to the Act, and also motor boats more than sixty-five feet in length, shall carry life preservers or life belts or similar devices and fire extinguishing equipment. Section 5 requires that all motor boats carrying passengers for hire shall be in charge of a person duly licensed by the federal local board of Inspectors, and has the proviso that motor boats shall not be required to carry licensed officers except as required by the Motor Boat Act. 46 U. S. C. 511-518. Under the federal regulations, motor boats are required to have on board two copies of the pilot rules to be observed by them, with copies of the departmental circular.

As documented vessels of the United States, motor boats must be marked in a specified manner with their names and home ports. 46 U. S. C. 46. All vessels, regardless of tonnage, size, or manner

of propulsion, and whether or not carrying freight or passengers for hire (other than public vessels of the United States not engaged in commercial service), which have on board "any inflammable or combustible liquid cargo in bulk", are to be "considered steam vessels" and are made subject to the provisions of the statutes relating to such vessels. This provision does not apply to inflammable or combustible liquid for use as fuel or stores. Act of June 23, 1936, c. 729, 49 Stat. 1889; 46 U. S. C. 391a. Vessels transporting explosives or like dangerous cargo are subject to inspection to determine that such cargo may be carried with safety, and appropriate permit for that purpose is required. Act of August 26, 1935, c. 697, 49 Stat. 868, 46 U. S. C. 178. "Load lines" are established for merchant vessels of one hundred and fifty gross tons or over proceeding on a "coastwise voyage by sea", as defined, that is, outside the line dividing inland waters from the high seas. Act of August 27, 1935, c. 747, 49 Stat. 888, 46 U. S. C. 88. Compare International Load Line Convention of July 5, 1930, 47 Stat. 2229. It appears from statements in the record and in argument, which we do not understand to be challenged, that there are not more than three of respondents' motor tugs, here involved, which exceed one hundred and fifty tons gross.

The limited application of the provisions of the federal laws and regulations to vessels propelled by internal-combustion engines was recently and definitely brought to the attention of Congress. The report of the Bureau of Navigation and Steamboat Inspection showed that there were many large vessels of this class.[1] The Com-

[1] Report (June 25, 1935) of the Committee on Merchant Marine and Fisheries of the House of Representatives on "Inspection of Motor Vessels". H. R. Rep. No. 1321, 74th Cong., 1st sess. Reference was made to the situation as described by the Assistant Director of the Bureau of Navigation and Steamboat Inspection as follows:

"We have at the present time vessels that are operated by internal-combustion engines, of tonnages exceeding 100, there are 772 vessels of 819,935 gross tons that would come under the provision of this law [the proposed bill].

"For instance, we have in the class from 5,000 to 7,500 tons 29 vessels, with a total tonnage of 179,556; and over 7,500 tons we have 33 vessels, with a total tonnage of 300,292.

"Those large vessels at the present time are subject to only a very limited inspection—that is, the inspection of the hulls and boilers, and are required under the law to carry a licensed engineer and a licensed pilot. The provisions of section 4472 that provides for protection against fire do not apply to our 7,500-ton vessels that are in the trans-Atlantic trade. They are not required under the law to carry a single lifeboat. There are many other provisions of the steamboat inspection laws that are of the utmost importance to safety of life that do not apply to these large transoceanic vessels. As a matter of fact, we are inspecting those vessels at the present time, but it is only because the owners of the ships accept such inspection. It is not a matter of law".

mittee on Merchant Marine and Fisheries of the House of Representatives found that this situation was due to the fact "that when the steamboat inspection laws were passed, internal-combustion-engine laws were unknown, with the result that many of the existing laws apply to steam vessels and under the opinion of the law officers of the department, do not apply to vessels operated by machinery other than by steam". The Committee added that "it was very doubtful whether under existing law lifeboats could be required on these motor vessels".[2] To meet that situation Congress has provided that existing laws covering the inspections of steam vessels shall be applicable "to seagoing vessels of three hundred gross tons and over propelled in whole or in part by internal-combustion engines" to such extent as may be required by the regulations of the Board of Supervising Inspectors of Steam Vessels with the approval of the Secretary of Commerce. Act of June 20, 1936, c. 628, 49 Stat. 1544, 46 U. S. C. 367. Even as thus limited, the Act expressly excepts vessels engaged "in fishing, oystering, clamming, crabbing, or any other branch of the fishery or kelp or sponge industry". It is manifest that Congress carefully considered the application of existing laws and decided to what extent its field of regulation should be widened.[3] Congress decided to extend its regulation as to motor-driven vessels only to those of the specified class.

We find the conclusion inescapable that, apart from the particular requirements in other respects, there is no provision of the federal laws and regulations for the inspection of the hull and machinery of respondents' motor-driven tugs in order to insure safety or determine seaworthiness, where these tugs respectively do not carry freight or passengers for hire, or do not have on board any inflammable or combustible liquid cargo in bulk, or do not transport explosives or like dangerous cargo, or are not seagoing vessels of three hundred gross tons or over, or, with respect to requirements as to load lines, are under one hundred and fifty gross tons. It follows that inspection of the hull and machinery of these tugs by state authorities in order to insure safety and determine seaworthiness is not in conflict with any express provision of the federal laws and regulations. The testimony in the record shows that

[2] H. R. Rep. No. 2505, 74th Cong., 2d sess.

[3] *Id.*

those laws and regulations are administered in accordance with this view.

Second.—The next question is whether the federal statutes are to be construed as implying a prohibition of inspection by state authorities of hull and machinery to insure safety and determine seaworthiness in the case of vessels which in this respect lie outside the federal requirements.

The state court took the view that Congress had occupied the field and that no room was left for state action in relation to vessels plying on navigable waters within the control of the federal government. 186 Wash. pp. 593, 596. And this is the argument pressed by respondents and the Solicitor General.

This argument, invoking a familiar principle, would be unnecessary and inapposite if there were a direct conflict with an express regulation of Congress acting within its province. The argument presupposes the absence of a conflict of that character. The argument is also unnecessary and inapposite if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action. In that class of cases the Constitution itself occupies the field even if there is no federal legislation. The argument is appropriately addressed to those cases where States may act in the absence of federal action but where there has been federal action governing the same subject. *Prigg* v. *Pennsylvania*, 16 Pet. 539, 617, 618; *Northern Pacific Railway Co.* v. *Washington*, 222 U. S. 370, 379; *Erie Railroad Co.* v. *New York*, 233 U. S. 671, 681, 682; *Southern Railway Co.* v. *Railroad Commission*, 236 U. S. 439, 446, 447; *Oregon-Washington R. & N. Co.* v. *Washington*, 270 U. S. 87, 101, 102; *Napier* v. *Atlantic Coast Line R. R. Co.*, 272 U. S. 581, 612, 613; *Gilvary* v. *Cuyahoga Valley Rwy. Co.*, 292 U. S. 57, 60, 61.

Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases*, 230 U. S. 352, 402. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule

which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot "be reconciled or consistently stand together". *Sinnot* v. *Davenport,* 22 How. 227, 243; *Missouri, Kansas & Texas Rwy. Co.* v. *Haber,* 169 U. S. 613, 623, 624; *Reid* v. *Colorado,* 187 U. S. 137, 148; *Crossman* v. *Lurman,* 192 U. S. 189, 199, 200; *Asbell* v. *Kansas,* 209 U. S. 251, 257, 258; *Missouri Pacific Rwy. Co.* v. *Larabee Mills,* 211 U. S. 612, 623; *Savage* v. *Jones,* 225 U. S. 501, 533; *Atlantic Coast Line* v. *Georgia,* 234 U. S. 280, 293, 294; *Carey* v. *South Dakota,* 250 U. S. 118, 122; *Atchison, T. & S. F. Rwy. Co.* v. *Railroad Commission,* 283 U. S. 380, 392, 393; *Mintz* v. *Baldwin,* 289 U. S. 346, 350. *Gilvary* v. *Cuyahoga Valley Rwy. Co., supra.*

A few illustrations will suffice. In *Reid* v. *Colorado, supra,* the question arose with respect to a statute of Colorado aimed at the prevention of the introduction into the State of diseased animals. One who had been convicted of its violation contended that the subject of the transportation of cattle by one State to another had been so far covered by the federal statute, known as the Animal Industry Act (23 Stat. 31), that no enactment by the State upon that subject was permissible. While the congressional act did deal with the subject of the driving or transporting of diseased livestock from one State into another, Congress had gone no further than to make it an offense against the United States for one *knowingly* to take or send from one State to another livestock affected with infectious or communicable disease. The Court concluded that the state statute, requiring a certificate that the cattle were free from disease, irrespective of the shipper's knowledge of the actual condition of the cattle, did not cover the same ground as the Act of Congress and was not inconsistent with it. *Id.,* pp. 149, 150. The principle was thus emphatically stated: "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested.

This court has said—and the principle has often been reaffirmed—that, 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together' ".

In *Savage* v. *Jones, supra,* the Court held that a statute of Indiana regulating the sale, and requiring a statement of the formula of ingredients, of concentrated commercial food for stock was not repugnant to the federal Food and Drugs Act of 1906 (34 Stat. 768). A citizen of Minnesota sought to restrain the enforcement of the Indiana statute with respect to stock food sold and transported in interstate commerce. The federal act dealt with the subject of adulterated and misbranded foods and defined misbranding. It covered any false or misleading statements as to ingredients but did not require a disclosure of the ingredients. The State statute dealt with that omitted matter. We found that the state requirements could be sustained without impairing the operation of the federal act as to the matters with which that act dealt. We said: "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State".

In *Mintz* v. *Baldwin, supra,* the question related to the validity of the requirement of a New York statute that cattle brought into that State for dairy or breeding purposes, and also the herds from which they came, should be certified to be free from Bang's disease by the chief sanitary official of the State of origin. One of the contentions was that the statute conflicted with the federal statute known as the Cattle Contagious Disease Act of 1903. 32 Stat. 791. To enable the Secretary of Agriculture to prevent the spread of disease among cattle and other livestock, he was authorized to establish regulations concerning interstate transportation from any place where he had reason to believe that diseases existed. When an inspector of the Bureau of Animal Industry certified that he had inspected cattle and had found them free from communicable

disease, they were permitted to be transported "without further inspection, or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture". But the express exclusion of state inspection extended only to cases where there had been federal inspection and a certificate issued. Accordingly we held that it could not be extended to the case before the Court where the cattle had not been inspected and certified by federal authority. We said: "The purpose of Congress to supersede or exclude state action against the ravages of the disease is not lightly to be inferred. The intention so to do must definitely and clearly appear".

The application of the principle is strongly fortified where the State exercises its power to protect the lives and the health of its people. But the principle is not limited to cases of that description. It extends to exertions of state power directed to more general purposes. Thus it was applied in sustaining the order of a state commission requiring interstate carriers to construct a union passenger station as against the contention that Congress had occupied the field—in view of the broad sweep of the Act conferring authority upon the Interstate Commission to deal with the operation of interstate railroads—as it was found that Congress had not authorized the commission to meet the public need in the particular matter in question. *Atchison, T. & S. F. Rwy. Co.* v. *Railroad Commission, supra,* p. 391.

In the instant case, in relation to the inspection of the hull and machinery of respondents' tugs, the state law touches that which the federal laws and regulations have left untouched. There is plainly no inconsistency with the federal provisions. It would hardly be asserted that when Congress set up its elaborate regulations as to steam vessels, it deprived the State of the exercise of its protective power as to vessels not propelled by steam. The fact that the federal regulations were numerous and elaborate does not extend them beyond the boundary they established. When Congress took up the regulation of vessels otherwise propelled it applied its requirements to vessels of a described tonnage which carried freight or passengers for hire. When Congress a few years later passed the Motor-Boat Act, it did not attempt to deal with the subject comprehensively but laid down rules in a few particulars of a definitely restricted range. And when, in 1936, Congress

again addressed itself to the subject, it did not purport to occupy the entire field but confined its regulation to seagoing vessels of three hundred gross tons and over. It would be difficult to find a series of statutes in which the intention of Congress to circumscribe its regulation and to occupy a field limited by definite description is more clearly manifested.

When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the State to exclude diseased persons, animals and plants. These are not proper subjects of commerce and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce. When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess. And we are unable to conclude that so far as concerns the inspection of the hull and machinery of these vessels of respondents in order to insure safety and seaworthiness, the federal laws and regulations, which as we have found are not expressly applicable, carry any implied prohibition of state action.

Much is made of the fact that the state law remained unenforced for a long period. But it did not become inoperative for that reason. Where the state police power exists, it is not lost by nonexercise but remains to be exerted as local exigencies may demand.

Third.—The remaining question is whether the state law must fall in its entirety, not because of inconsistency with federal action, but because the subject is one as to which uniformity of regulation is required and hence, whether or not Congress has acted, the State is without authority. *Cooley* v. *Board of Wardens,* 12 How. 299, 319; *Minnesota Rate Cases,* 230 U. S. 352, 399, 400.

The state law is a comprehensive code. While it excepts vessels which are subject to inspection under the laws of the United States, it has provisions which may be deemed to fall within the class of regulations which Congress alone can provide. For example, Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, Cali-

fornia another, and so on. But it does not follow that in all respects the state act must fail.

We have found that in relation to the inspection of the hull and machinery of these tugs, in order to insure safety and seaworthiness, there is a field in which the state law could operate without conflict with present federal laws. Is that a subject which necessarily and in all aspects requires uniformity of regulation and as to which the State cannot act at all, although Congress has not acted? We hold that it is not. A vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of that principle. The State may treat it as it may treat a diseased animal or unwholesome food. In such a matter, the State may protect its people without waiting for federal action providing the state action does not come into conflict with federal rules. If, however, the State goes further and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises.

We have mentioned the inspection of hull and machinery of respondents' vessels in order to insure safety and seaworthiness. There may be other requirements of the state act which also lie outside the bounds of the federal action thus far taken and as to which uniformity of regulation is not needed. That question cannot be satisfactorily determined on this record and must also remain for decision as it may be presented in the future in connection with some particular action taken by the state authorities. Our conclusion is that the state act has a permissible field of operation in relation to respondents' tugs and that the state court was in error in holding the act completely unenforceable in deference to federal law. The judgment of the state court to that effect is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.